IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1005

LARRY PRESSLER,
Member, United States House of Representatives,
Appellant,

v.

WILLIAM E. SIMON,
Secretary of the Treasury;
FRANCIS R. VALEO,
Secretary of the United States Senate;
KENNETH R. HARDING,
Sergeant-at-Arms of the United States
House of Representatives,
Appellees.

On Appeal From the United States District Court
For the District of Columbia

JURISDICTIONAL STATEMENT

LARRY PRESSLER
1132 Longworth House Building
Washington, D.C. 20505
(202) 225-2801

Appellant, Pro Se

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OPINION BELOW

The opinion of the district court is reproduced as Appendix A, *infra,* and is not yet reported in Federal Supplement.

JURISDICTION

On May 7, 1976, appellant brought this action in the United States District Court for the District of Columbia to enjoin the increased salary disbursements to members of Congress authorized by section 225 of the Postal Revenue and Salary Act of 1967, 2 U.S.C. §§ 351-361, and section 204(a) of the Executive Salary Cost-of-Living Adjustment Act of 1975, 2 U.S.C. § 31, on grounds that such disbursements violated Article I, Sections 1 and 6 of the United States Constitution. A three-judge district court was convened pursuant to 28 U.S.C. §§ 2282 and 2284. Appellant's claims were submitted to the court on cross motions for summary judgment and appellees' motion to dismiss. On October 12, 1976, the three-judge district court filed an opinion sustaining the constitutionality of the statutes in question. Appendix A, *infra.* The memorandum opinion concluded with an order granting summary judgment to appellees and dismissing appellant's complaint. Appendix A, *infra,* at 8a. On October 22, 1976, appellant filed a timely notice of appeal. Appendix B, *infra.* On December 16, 1976, the Chief Justice extended the time for docketing this appeal to January 20, 1977. The Court has jurisdiction over this appeal by virtue of 28 U.S.C. § 1253.

QUESTION PRESENTED

Whether the methods of determining salary rates for Senators and Representatives under section 225 of the Postal Revenue and Salary Act of 1967 and section 204(a) of the Executive Salary Cost-of-Living Adjustment Act of 1975 violate Article I, Sections 1 and 6 of the Constitution because they authorize changes in

compensation for members of Congress without requiring a direct vote by either House of Congress.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 1 of the Constitution provides, in pertinent part, that:

> All legislative Powers . . . shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

2. Article I, Section 6 of the Constitution provides, in pertinent part, that:

> The Senators and Representatives shall receive a compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States.

3. Section 225 of the Postal Revenue and Salary Act of 1967, Pub. L. No. 90-206, 81 Stat. 642, is codified at 2 U.S.C. §§ 351-361, and is reproduced as Appendix C, *infra.*

4. Section 204(a) of the Executive Salary Cost-of-Living Adjustment Act of 1975, Pub. L. No. 94-82, 89 Stat. 421, is codified at 2 U.S.C. § 31 and provides, in pertinent part, that:

> (1) The annual rate of pay for—
>
> (A) each Senator [and] Member of the House of Representatives, and . . .,
>
> (B) the President pro tempore of the Senate, the majority leader and the minority leader of the Senate, and the majority leader and the minority leader of the House of Representatives, and

(C) the Speaker of the House of Representatives,

shall be the rate determined for such positions under sections 351 to 361 of this title, as adjusted by paragraph (2) of this section.

(2) Effective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under section 5305 of Title 5 in the rates of pay under the General Schedule each annual rate referred to in paragraph (1) shall be adjusted by an amount, rounded to the nearest multiple of $100 (or if midway between multiples of $100, to the next higher multiple of $100), equal to the percentage of such annual rate which corresponds to the overall average percentage (as set forth in the report transmitted to the Congress under section 5305 of Title 5) of the adjustment in the rates of pay under the General Schedule.

STATEMENT

For 178 years—in every Congress from the 1st through the 90th—the rate of compensation for Senators and Representatives was determined by an act of Congress which specifically set forth the dollar amount members were to be paid. In 1967, however, Congress broke with this uniform, continuous tradition by including its members within the coverage of section 225 of the Postal Revenue and Salary Act of 1967 (hereinafter the "1967 Salary Act").

Section 225 of the 1967 Salary Act established the Commission on Executive, Legislative, and Judicial Salaries.[1] 2 U.S.C. § 351. Subsection (f) of section 225

[1] The Commission consists of nine members, three appointed by the President, two appointed by the President of the Senate, two appointed by the Speaker of the House of Representatives, and two appointed by the Chief Justice of the Supreme Court. 2 U.S.C. §352(1). The Commission members are appointed to a term that lasts only for the period of the fiscal year with respect to which they were appointed. 2 U.S.C. §§ 352(2)-(3).

directed the Commission to conduct in fiscal year 1969, and every fourth fiscal year thereafter, a study of the rates of compensation paid to members of Congress, Justices of the Supreme Court, federal judges, and certain other high ranking government officials. 2 U.S.C. § 356. On or before January 1, following the completion of each quadrennial Commission study, the Commission must submit the results of its review to the President, together with recommendations regarding salary adjustments. 2 U.S.C. § 357. Under subsection (h) of section 225, the President must include in each budget immediately following receipt of a Commission quadrennial report his own recommendations regarding the salary rates of officials covered by the act. 2 U.S.C. § 358. Under subsection (i) of section 225, the salary recommendations of the President automatically become effective after 30 days unless (a) a law has been enacted establishing a rate of pay other than that recommended or (b) one House of Congress enacts legislation specifically disapproving all or any part of the President's recommendations. 2 U.S.C. § 359(1).

In December of 1968, the Commission submitted its first quadrennial report to the President. The Commission's report recommended substantial salary increases for all of the positions covered by the act. On January 15, 1969, the President submitted to Congress his budget for the next fiscal year. The President's budget included a recommendation in favor of the salary increases suggested by the Commission. Congress took

no action with respect to the President's salary recommendations; consequently, the salary increases became effective on February 15, 1969. *See* 34 Fed. Reg. 2241 (Feb. 15, 1969). As a result of Congress' failure to act within 30 days, appellees increased salary disbursements to members of Congress by 41.67%, from $30,000 to $42,500 per annum.

The second Commission was appointed in December 1972, too late to report to the President by January 1, 1973. The second Commission quadrennial report was submitted to the President on June 30, 1973. The Commission's report recommended substantial salary increases for all officials covered by the act. On February 4, 1974, the President submitted his budget to Congress, including a recommendation in favor of the salary increases suggested by the Commission. On February 28, 1974, the Senate Committee on Post Office and Civil Service reported a resolution, S. Res. 293, which would have permitted all provisions of the President's recommendations, except those providing adjustments in the pay of members of Congress, to take effect. S. Rep. No. 701, 93rd Cong., 2d Sess. (1974). However, the Committee resolution was amended on the floor of the Senate and passed in a form that disapproved all of the recommended salary adjustments. 120 Cong. Rec. 5492-5497, (March 6, 1974); S. Res. 293, 93rd Cong., 2d Sess. (1974).

On December 2, 1976, the Commission submitted its third quadrennial report to the President. The Commission recommended an average 36.4% salary increase for officials covered by the act. However, the Commission made its salary recommendations expressly conditional on the adoption of a strict code of public conduct for all officials involved, which (i) would require full public disclosure of all outside sources of income; (ii) would restrict the nature and amount of outside income that could be earned by an official while in office; (iii) would include strict conflict of interest prohibitions; (iv) would limit the nature of post-government service employment that would be allowed; and (v) would require unambiguous restrictions on expense accounts and vigorous auditing thereof.

On January 17, 1977, the President transmitted his budget to Congress. The President's budget recommended pay increases only slightly lower than those recommended by the Commission. Like the Commission's recommendations, the President's salary recommendations were conditioned upon the adoption of a strict code of public conduct for all officials covered by the act. Although it is not clear what impact the conditional nature of the President's salary recommendations will have, it is probable that if Congress does not act within 30 days, the appellees will increase salary disbursements to members of Congress by 28.92%, from $44,600 [2] to $57,500 per annum.

The second statute involved in this appeal is the Executive Salary Cost-of-Living Adjustment Act of 1975 (hereinafter the "1975 Adjustment Act"). Prior to 1975, members of Congress, Justices of the Supreme Court, federal judges, and certain high ranking offi-

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[2] As is noted *infra*, at 10, Executive Order 11941 had the effect of raising the salary rate for Senators and Representatives 4.83%, from $44,600 to $46,800 per annum. *See* 41 Fed. Reg. 43889, 43894 (October 5, 1976). However, no disbursements of this increase have been made because Congress did not appropriate sufficient funds for such disbursements in the Legislative Appropriations Act of 1977.

cials were excluded from the annual government salary adjustments authorized by the Federal Pay Comparability Act of 1970, Pub. L. No. 91-656, 84 Stat. 1946, *codified at* 5 U.S.C. §§ 5305-5312. In general, Title II of the 1975 Adjustment Act extended the annual salary adjustment provisions of the Federal Pay Comparability Act to all of the government officials that previously had been excluded from its coverage. In particular, section 204(a) of the 1975 Adjustment Act provided that the rate of compensation for each member of Congress shall automatically be increased every time GS-graded employees receive an annual adjustment under the Federal Pay Comparability Act. The amount of an increase under section 204(a) is a percentage equal to the average overall percentage by which the GS salaries are increased (or would have been increased but for the statutory ceiling on upper level GS salaries).[3]

Since the adjustments to Congressional salaries under the 1975 Adjustment Act depend entirely on the adjustments to the GS salaries ordered under the Federal Pay Comparability Act, the provisions of the latter statute must be considered briefly. The Federal Pay Comparability Act requires the President to adjust annually the salaries of all GS-graded employees, all armed forces personnel, and all other federal employees compensated under a "statutory pay system." 5 U.S.C. § 5305(a)(2). The amount of each annual adjustment is governed by standards expressly set forth in the act. See 5 U.S.C. §§ 5301(a)(1)-(a)(4), 5305(a)-(b). *See generally National Treasury Employees Union* v. *Nixon,* 492 F.2d 587 (D.C. Cir. 1974).

[3] 5 U.S.C. § 5308 provides that no GS-graded employee may receive a salary in excess of the rate of basic pay for level V of the Executive Schedule. Under this provision, all salaries above GS-15 are presently frozen at $39,600 per annum. 41 Fed Reg. 43890 (Oct. 5, 1976). The effects of the statutory ceiling on so-called supergrade GS salaries are excluded when computing the average percentage at which § 204(a) adjustments to Congressional salaries are made.

If, because of national emergency or economic conditions, the President deems it inappropriate to order adjustments in the full amount required by the act, the President must submit to Congress, at least 30 days prior to the normal date for adjustment, an alternative plan and an explanation setting out the reasons therefor. 5 U.S.C. § 5305(c). If neither House of Congress disapproves the alternative plan within 30 days, it automatically becomes effective. If either House of Congress does disapprove the alternative plan, the President must immediately order the adjustments in the full amounts required under the act. In either event, the adjustments become effective as of the normal date for ordering adjustments. (October 1st).

If the President does not submit an alternative plan to Congress, he has a mandatory duty to order the full amount of the adjustments required under the act. *National Treasury Employees Union* v. *Nixon, supra,* 492 F.2d at 616. These adjustments become effective immediately and automatically. Under the act, Congress has no power to approve or disapprove such adjustments ordered by the President. The only recourse for Congress against a Presidential order adjusting pay would be repeal of the act, at least *pro tanto,* enactment of an entirely new schedule of salaries, or refusal to appropriate the sums necessary to fund the adjustments.

On October 6, 1975, the President ordered federal pay comparability adjustments for all federal em-

ployees compensated under a statutory pay system. Executive Order 11883, 40 Fed. Reg. 47092 (October 8, 1975). Since this order increased the salaries of GS-graded employees by an overall average of 4.94%, appellees increased salary disbursements to Senators and Representatives by 4.94% (from $42,500 to $44,600 per annum), as required by section 204(a) of the 1975 Adjustment Act.

On October 1, 1976, the President ordered federal pay comparability adjustments for all federal employees compensated under a statutory pay system. Executive Order 11941, 41 Fed. Reg. 43889 (October 5, 1976). Since this order increased the salaries of GS-graded employees by an overall average of 4.83%, section 204(a) automatically raised the salary rates for Senators and Representatives by 4.83% (from $44,600 to $46,800 per annum). However, appellees have not yet increased disbursements to the salary rates set under Executive Order 11941 because Congress did not appropriate sufficient funds for such disbursements in the Legislative Appropriations Act of 1977.

On May 7, 1976, appellant brought this action in the United States District Court for the District of Columbia. Appellant sought a declaratory judgment that section 225 of the 1967 Salary Act and section 204(a) of the 1975 Adjustment Act were unconstitutional insofar as they authorized adjustments to the salary rates for Senators and Representatives without requiring a direct vote of Congress. Appellant also sought to enjoin appellees from disbursing in the future any amounts of money attributable to Congressional salary adjustments under the acts. After a three-judge district court had been convened, appellant moved for summary

judgment. Appellees filed cross motions for summary judgment and a motion to dismiss appellant's complaint. After briefs and oral argument on the various motions had been submitted, the three-judge district court filed a memorandum opinion and order sustaining the statutes in question, granting summary judgment to appellees, and dismissing appellant's complaint. Appendix A, *infra*.

The opinion of the district court acknowledged that the question presented by appellant was one of first impression. Memorandum Opinion at 5, Appendix A at 6a. The court also recognized that the statutory provisions in question delegated much of Congress' authority to determine salary rates for its members. Nevertheless, the court concluded that the two statutes satisfied the requirements of Article I, Section 6, that Congressional salaries "be ascertained by Law" because (i) in passing the statutes themselves, Congress had acted "by law" (*i.e.*, by direct act of Congress); (ii) the delegation of power to ascertain Congressional salaries was not absolute because Congress retained a 30-day veto power for each House, as well as an underlying Congressional power to refuse appropriation of the sums necessary for actual disbursement; and (iii) the language of the Constitution must be read flexibly and, when so read, the ascertainment clause of Article I, Section 6 does not mandate a direct vote of Congress on each adjustment to the salary rates of Senators and Representatives.

Appellant filed a timely notice of appeal. Appendix B, *infra*. For the reasons stated below, appellant believes that all three of the district courts' conclusions enumerated above were in error, that the claim pre-

sented in this case is a substantial one which requires plenary consideration in this Court, and, therefore, that probable jurisdiction should be noted.

THE QUESTION PRESENTED IS SUBSTANTIAL

A. Appellant's Interpretation of Article I, Section 6 Is Supported by Prior Decisions, the Constitutional Debates, and the Contemporaneous Conduct of the Early Congresses

1. Article I, Section 6 of the Constitution provides that the salary rates of Senators and Representatives "shall be ascertained by Law." Although no reported case has construed the ascertainment clause of Article I, Section 6, cases construing analogous language in other parts of the Constitution [4] have unanimously concluded that the phrase "by Law" means "by act of Congress."

For example, in *Cincinnati Soap Company* v. *United States,* 301 U.S. 308 (1937), this Court stated that:

> The provision of the Constitution (cl. 7, § 9, Art. I) that "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law" . . . means simply that no money can be paid out of the Treasury unless it has been appropriated by *an Act of Congress.*

301 U.S. at 321 (emphasis supplied).

Similarly, in construing Article II, Section 2, which provides that:

> . . . the Congress may *by Law* vest the Appointment of such inferior Officers, as they think prop-

[4] In addition to Article I, Section 6, the phrase "by Law" appears in Article I, Section 2, clause 3; Article I, Section 4, clauses 1 and 2; Article I, Section 9, clause 7; Article II, Section 2, clause 5; Article II, Section 1, clause 2; and Article III, Section 2, clause 3.

> er, in the President alone, in the Courts of Law, or in the Heads of Departments[,]

the phrase "by Law" has been held to mean "by specific legislation." *Cain* v. *United States,* 73 F. Supp. 1019, 1021 (N.D. Ill. 1947).

When the reasoning of these cases is applied to the ascertainment clause, it clearly requires that the salary rates of Senators and Representatives "shall be ascertained by [act of Congress]," that is to say, by a direct vote of both Houses of Congress followed by the signature of the President.

2. Appellant's reading of the ascertainment clause is also supported by the Constitutional convention and ratification debates on the pay provisions of Article I, Section 6. Under the Articles of Confederation, delegates to the national assembly were paid by the states they represented. Articles of Confederation, Article V, Section 2. The pay provisions of Article I, Section 6, were intended as a change from this scheme which would ensure that members of Congress would be free to act for the good of the federal government without being subjected to the whims of the local state governments. *See, e.g.,* 5 Elliot, Debates on the Adoption of the Federal Constitution, 227-228 (1888); 1 Farrand, Records of the Federal Convention of 1787, at 373-374 (1937).

In response to objections that Congressmen should not be allowed unlimited power to set their own salaries, it was repeatedly stated that the public accountability of Senators and Representatives through the reelection process would operate as a sufficient check on Congressional enactment of excessive salaries. Thus, in the Massachusetts ratification debates, Delegate

Sedgwick defended Article I, Section 6, in the following terms:

> Can a man, he asked, who has the least respect for the good opinion of his fellow-countrymen, go home to his constituents after having robbed them by voting himself an exorbitant salary? This principle will be a most powerful check: and, in respect to economy, the power, lodged as it is in this section will be more advantageous to the people, than if retained by the State legislatures.

Debates and Proceedings in the Convention of the Commonwealth of Massachusetts, 152-153 (1856).

Similarly, in the Virginia ratification debates, Madison explained and defended Article I, Section 6, in the following terms:

> "Mr. Chairman.—I most sincerely wish to give a proper explanation on this subject, in such a manner as may be to the satisfaction of every one. I shall suggest such consideration as led the convention to approve this clause. With respect to the right of ascertaining their own pay, I will acknowledge, that their compensations, if practicable, should be fixed in the constitution itself, so as not to be dependent on congress itself, or on the state legislatures. The various vicissitudes, or rather the gradual diminution of the value of all coins and circulating medium, is one reason against ascertaining them immutably; as what may be now an adequate compensation, might, by the progressive reduction of the value of our circulating medium, be extremely inadequate at a period not far distant.
>
> It was thought improper to leave it to the state legislatures, because it is improper that one government should be dependent on another: and the

> great inconveniences experienced under the old confederation, shew, that the states would be operated upon by local considerations, as contradistinguished from general and national interests. . . . [The power vested in Congress to set its members' pay] *is a power which cannot be abused without rousing universal attention and indignation. What would be the consequence of the Virginia legislature raising their pay to four or five pounds each per day? The universal indignation of the people. Should the general congress annex wages disproportionate to their service, or repugnant to the sense of the community, they would be universally execrated. The certainty of incurring the general destestation of the people will prevent abuse. . . .*
>
> But the worthy member supposes, that congress will fix their wages so low, that only the rich can fill the offices of senators and representatives. Who are to appoint them? The rich? No sir, the people are to choose them. *If the members of the general government were to reduce their compensations to a trifle, before the evil suggested could happen, the people could elect other members in their stead, who would alter that regulation.* . . . I think the evil very remote, and if it were now to happen, the remedy is in our own hands, and may by ourselves be applied. . . .

3 Farrand, *supra* at 314-316 (emphasis supplied).

3. The interpretation of Article I, Section 6, advanced in the convention and ratification debates is fully confirmed by the contemporaneous conduct of the early Congresses. The 1st Congress established the rates of pay for Senators and Representatives by act of Congress. Act of September 22, 1789, 1 Stat. 70. Indeed, as has already been noted, every Congress prior to the enactment of the 1967 Salary Act adjusted the salary

rates for its members only by direct act of Congress. Surely this early and long-standing tradition reflects the only appropriate construction of Article I, Section 6. *Cf. Myers* v. *United States,* 272 U.S. 52, 174 (1926).

B. The Reasoning of the District Court Is in Error

1. The district court rejected appellant's claim, at least initially, on the ground that "when Congress passed the Acts governing its compensation it acted 'by law'." It is, of course, true that the 1967 Salary Act and the 1975 Adjustment Act were enacted "by law" in the sense that there were no procedural irregularities in the legislative process. This fact, however, is no answer to appellant's claims. Appellant contends that Congressional salary rates themselves must be ascertained by act of Congress. This requirement is not satisfied by the fact that a procedurally regular act of Congress has established various commissions and procedures by which the executive branch ascertains the salary rates to be paid to members of Congress.

2. The district court also concluded that the statutory procedures in question effectively resulted in an ascertainment "by law" because Congress has retained a veto power in each House over recommended adjustments. Admittedly, each House of Congress does have a theoretical veto power over all or any parts of the salary adjustments recommended by the President under the 1967 Salary Act. However, the non-exercise of this theoretical veto power falls far short of an ascertainment of Congress of the salary rates that its members should be paid.

First, Congressional inaction is a passive fact that never could be considered an affirmative act of ascertainment, as required by Article I, Section 6.

Second, even if Congressional inaction could be viewed as tantamount to an affirmative ascertainment, the failure of Congress to act gives the American voters no record of where their Senators and Representatives stood on an increase that has taken effect. This latter point is extremely important because the ratification debates on the Congressional pay provisions of Article I, Section 6, clearly reflect an expectation that public accountability would operate as an adequate check on Congress' power to set its own rates of pay.

Finally, the veto power retained by Congress in the 1967 Salary Act is so severely limited by practical considerations that it cannot be considered the effective equivalent of a direct act of Congress. The exercise of the veto power is limited to a 30-day period, which makes the normal parliamentary process of hearings, report, debate, and final vote wholly impracticable. Moreover, as the experience in 1974 demonstrated, the consideration of Congressional salary recommendations under the Salary Act necessarily becomes confused with extraneous or conflicting considerations regarding the salary recommendations for officials other than members of Congress.

When one turns from the Salary Act to the Adjustment Act, the inadequacy of the Congressional veto power is even more apparent. Unlike Presidential recommendations under the Salary Act, salary adjustments ordered under the 1975 Adjustment Act take effect automatically. Congress has no power under the act to approve or disapprove Adjustment Act increases ordered by the President. The only veto power retained by Congress under the Adjustment Act is the power to veto within 30 days a Presidential "alterna-

tive plan" submitted under the national emergency or economic conditions provisions of 5 U.S.C. § 5305(c). See 5 U.S.C. §§ 5305(d)-(k). Even when the President submits an alternative plan, the power retained by Congress under the act is only a power to reject the alternative plan. If the alternative plan is rejected, the increases normally required under the act automatically take effect with no power in Congress to review or reject them.

3. The district court opinion suggests that since Congress can refuse to appropriate sufficient sums to fund the salary levels set by the challenged statutes, Congress has retained the final power to ascertain the true salaries actually paid. However, the district court's reliance on the appropriation power is no answer to appellant's claim.

Article I, Section 7, provides that no moneys shall be drawn from the Treasury except "in Consequence of Appropriations made by law." Under the district court's reasoning, the separate requirement in Article I, Section 6, of an ascertainment by law is rendered superfluous if an appropriation bill could suffice as an ascertainment. In the context of this case, Article I, Section 6 and Article I, Section 7 clearly require that the salary rates for Senators and Representatives must be ascertained by act of Congress and paid from the Treasury only when there has been an appropriation by act of Congress.

The district court's reliance on the appropriations power to satisfy the ascertainment clause also fails to recognize the inherent limitations of the appropriations process. If, for example, Congress believes the salary rates set under the 1967 Salary Act or the 1975

Adjustment Act are too low, no appropriation of additional sums could authorize disbursements at a higher rate. Moreover, to the extent that the appropriation power can be used as a partial veto of salary increases, it is an extremely impractical tool. The practical, as well as the parliamentary considerations involved in the passage of an appropriations bill make it wholly unsuitable as a vehicle for ascertaining the propriety of Congressional salary levels. Moreover, the subtle intricacy of using an appropriations bill as an indirect method of ascertaining Congressional salaries would completely subvert the policy of public accountability implicit in Article I, Section 6.

4. The district court opinion suggests that the Commission recommendations under the Salary Act are at least partially determined by Congress because two of the nine Commission members are appointed by the Speaker of the House and two more are appointed by the President of the Senate (*i.e.*, the Vice President of the United States). However, the mere fact of appointment by the Speaker of the House or the President of the Senate does not make the Congressional appointees representative of all of the various views in Congress. Moreover, even if the Congressional appointees could accurately represent all of the views in Congress, Article I, Section 6 requires Congress itself, and not some Commission with a minority of Congressional representatives, to ascertain the salary rates for Senators and Representatives.

5. The final ground upon which the district court relied was that the language of the Constitution

> . . . is not to be parsed in the narrow, rigid, manner of a statute. It must remain flexible and adapt-

able, placing reliance upon the checks-and-balances built into our tripartite format and the sound attitude of voters expressed at the polls.

Memorandum Opinion at 7-8, Appendix A at 8a.

There can be no doubt that the Constitution is an organic document that must be read with careful attention to the changes in, and changeability of, our society. However, there is nothing about American society which has altered the process of setting salary rates for Senators and Representatives. For 178 years the rates of Congressional compensation were set by a simple, direct act of Congress. The process of raising Congressional salaries was frequently politically embarrassing to the members involved, but that embarrassment was merely a manifestation of the public accountability that Article I, Section 6 intended. Nothing about American society has changed in a way that would make direct Congressional ascertainment of its own members' pay more difficult now than was true for the first Congress in 1789.

Indeed, if anything is clear from the experiences under the 1967 Salary Act and the 1975 Adjustment Act, it is the wisdom of requiring Congress to set its own salaries in a discrete act of Congress. In the ten years since the passage of the Salary Act, the method of determining rates of compensation for most high ranking federal executives and judicial officers has been inextricably intertwined with the politically sensitive question of ascertaining Congressional pay. As a direct result, the worst of both worlds has been realized. On the one hand, Congressional salaries have increased 56% in ten years without passage of a single act of Congress which the American voters can look to in

judging the performance of their Senators and Representatives. On the other hand, badly needed increases in federal executive and judicial salaries have been rejected outright or frustrated in the appropriations process solely because they were intertwined with increases in Congressional pay that Congress believed to be inappropriate or politically unwise.

C. Appellant's Claim Raises Important Questions of Public Policy

Even if one ignores the doubtful nature of the district court's reasoning, appellant's claim is clearly of such importance that the Court should decide it only on the basis of full briefing and oral argument.

From an economic standpoint, very substantial sums of public finances are at stake. The increases in Congressional salaries recommended in the most recent quadrennial Commission report by themselves will require additional expenditures in excess of $7 million annually.

From the standpoint of governmental planning, it is clear that Congress and the President-elect intend to make substantial legislative additions to the legal structure under attack in this case. It is extremely important that this Court carefully consider and fully resolve all existing constitutional doubt about the existing legal structure before substantial additions are built upon it.

From a social policy standpoint, the case is doubly important. First, it is clear that the inadequacy of salaries for high ranking federal executives and judicial officers is a serious and growing problem. Appellant submits that no scheme of salary adjustment will ever solve this problem until the discrete and politically

sensitive question of ascertaining Congressional salaries is returned to its traditional and constitutionally mandated arena. Second, it is also clear that there is a popular belief that Congress is not sufficiently accountable to the public. Appellant's claim, if sustained, would restore the public accountability with respect to Congressional salaries that Article I, Section 6 intended.

D. Appellant's Claim Will Not Subvert the Methods of Ascertaining Non-Congressional Salaries or Result in Any Undue Hardship to Members of Congress

Although the issue presented by appellant is one of major importance, it should be noted that appellant's claim is limited in three significant respects.

First, appellant is not attacking the entire salary revision structure created by the 1967 Salary Act and the 1975 Adjustment Act. Appellant's claim, like Article I, Section 6 itself, is limited solely to the question of Congressional salaries. Appellant is seeking to enjoin only those increases in salary disbursements that are paid to members of Congress under the acts. Appellant's arguments do not affect the propriety of the acts insofar as they create a procedure for ascertaining executive or judicial salaries. The method of determining non-Congressional salaries under the acts is severable from the methods for ascertaining Congressional pay, and the injunctive relief requested by appellant would not affect the operation of the statutes insofar as non-Congressional salaries are involved.

Second, the injunctive relief that appellant is seeking in this case is limited to prospective relief only. Although appellant has donated to charity substantially all of his share of the increases in disbursements ordered under the statutes since his election to Con-

gress, it is apparent that retroactive equitable relief would be inappropriate in this case. *Cf., Chevron Oil Company* v. *Hudson,* 404 U.S. 97, 106-107 (1971). As a consequence, appellant is requesting injunctive relief only with respect to future disbursements of increases in Congressional pay that have been authorized under the acts.

Third, as this Court probably is aware, several federal judges have brought suit in the United States Court of Claims to challenge the levels of judicial pay. *Atkins, et al.* v. *United States,* Docket No. 41-76 (Ct. Cl., filed March 25, 1976). These judges claim that their salaries have been reduced in violation of Article III, Section 1, because the real dollar value of their compensation has steadily declined since the date of their appointment. Since appellant's claim is directed solely at the rates of Congressional pay, this appeal will not affect the claims in *Atkins.*

CONCLUSION

For all of the reasons stated above, appellant submits that the question presented in this appeal is substantial and that the Court should note probable jurisdiction and decide the case only upon full briefing and oral argument.

Respectfully submitted,

LARRY PRESSLER
1132 Longworth House Building
Washington, D.C. 20505
(202) 225-2801

Appellant, Pro Se

Dated: January 20, 1977

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 76-782

LARRY PRESSLER, Member, United States House of Representatives, *Plaintiff*,

v.

WILLIAM E. SIMON, Secretary of the Treasury; FRANCIS R. VALEO, Secretary of the United States Senate; KENNETH R. HARDING, Sergeant-at-Arms of the United States House of Representatives, *Defendants*.

Before TAMM, *Circuit Judge*; GESELL, *District Judge*; and FLANNERY, *District Judge*.

Memorandum Opinion and Order

(FILED OCTOBER 12, 1976)

PER CURIAM. This action seeks a judgment declaring that those sections of the Postal Revenue and Salary Act of 1967, 2 U.S.C. §§ 351 *et seq.* ("Salary Act") and the Executive Salary Cost-of-Living Adjustment Act of 1975, 2 U.S.C. § 31 ("Adjustment Act"), which provide procedures to set new rates of compensation for members of Congress are unconstitutional, and to enjoin increased disbursements to members of Congress under the Acts. Plaintiff, The Honorable Larry Pressler, is a member of the United States House of Representatives from the First Congressional District of South Dakota, first elected in November, 1974.

The issues come before this Court on cross-motions for summary judgment, and defendants' motions to dismiss.[1] Argument was heard by this three-judge district court pursuant to 28 U.S.C. § 2284.

The Salary Act established a Commission on Executive, Legislative and Judicial Salaries ("the Commission"). At four-year intervals the Commission must recommend to the President pay rates for Senators, Representatives, Federal Judges and certain officials in the Legislative, Judicial and Executive branches of Government. After receiving the Commission report, the President is required to submit in the next budget message his recommendations as to the exact pay rate for those positions covered by the Salary Act. The pay rates thus recommended by the President for the different positions, including members of Congress, become effective 30 days after the budget is submitted to Congress unless other rates have been enacted by law, or one House of Congress specifically disapproves all or part of the recommendations.

The Adjustment Act provides for automatic cost-of-living adjustments in the salaries of members of Congress and other Executive, Judicial and Legislative officials. It provides in § 204(A) that congressional salaries determined by the Salary Act procedures will be automatically increased by an amount equal to the present increase being made by the President in the rates of pay of federal employees covered by the General Schedule as provided in 5 U.S.C. § 5305.

These two interrelated statutes represent a major break with tradition. For the almost 180 years since the ratification of the Constitution, the precise compensation of members of Congress was always fixed from time to time by

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[1] The Honorable James M. Jeffords, Member At Large of the United States House of Representatives from Vermont, filed a brief *amicus* in support of plaintiff's position.

specific legislation without any legislative involvement by the President.

The first recommendations by the Commission under the Salary Act were made in December, 1968. The President's subsequent recommendations took effect in February, 1969, without any action by the Congress, and congressional salaries were increased from $30,000 to $42,500 per annum. Mr. Pressler was not yet a member of the House. In February, 1974, after Mr. Pressler took office, the President's salary recommendations following the second Commission report were submitted to Congress. The Senate, by resolution, rejected all pay increases. The next Commission is expected to report to the President by January, 1977.

In October, 1975, Executive Order 11883, 40 F.R. 47091, increased General Schedule salaries and accordingly congressional salaries covered by the Adjustment Act were automatically increased from $42,500 to $44,600 per annum. In September, 1976, Congress refused another automatic pay increase in congressional salaries under the Adjustment Act by refusing to appropriate necessary funds in the Legislative Appropriations Act for 1977.

Congressman Pressler claims that the Salary Act and the Adjustment Act, whose operation has just been reviewed, violate Article I, Section 1, of the Constitution, and, more importantly, Article I, Section 6, of the Constitution, which states in pertinent part:

> The Senators and Representatives shall receive a Compensation for their Services to be ascertained by Law,
> . . . .

He claims that the payment of congressional salaries by defendants pursuant to the statutes in question injure him as a member of the House of Representatives by depriving him of his constitutional duty to vote on each ascertainment of congressional salaries.

I. *Standing*

It is initially argued that Congressman Pressler has no case or controversy with the defendants and, thereby, lacks standing to assert his claims. He sues as a citizen, a taxpayer, and a Congressman. It is only in this latter capacity that he can be heard, if at all. *Richardson* v. *Kennedy,* 313 F. Supp. 1282 (W.D. Pa. 1970), *aff'd,* 401 U.S. 901 (1971).

A Congressman has standing to sue by reason of his office where Executive action has impaired the efficacy of his vote, *Kennedy* v. *Sampson,* 511 F.2d 430, 436 (D.C. Cir. 1974); *cf. Coleman* v. *Miller,* 307 U.S. 433 (1939), or certain other congressional duties. *Mitchell* v. *Laird,* 488 F.2d 611 (D.C. Cir. 1973). The resulting injury under such circumstances is said to create a personal stake in the outcome sufficient to assure that a suit by a Congressman affected would be in a proper adversary context. *Kennedy* v. *Sampson, supra; see Baker* v. *Carr,* 369 U.S. 186 (1962). Congressman Pressler alleges not that the efficacy of his legislative vote was impaired by the Executive, but rather that his vote was impaired by the failure of other members of Congress to assume an affirmative responsibility specifically placed on them by language of the Constitution. While it is clear that legislators have no special right to invoke court consideration of the validity of a statute passed over an objecting vote, *Korioth* v. *Briscoe,* 523 F.2d 1271 (5th Cir. 1975), where, as here, a member of Congress alleges he is prevented from voting to perform a specific legislative duty expressly mandated by the Constitution, the suit may be cognizable by the courts so long as there is no attempt being made to interfere with the internal workings of the Congress itself.[2]

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[2] If there were such an interference this case might present a political question, as was argued by defendants. But where statutes enacted by Congress are questioned under a specific constitutional clause, the political question doctrine should not be applied by the courts merely because a decision might have political consequences.

Mr. Pressler's suit meets this requirement, but he must show that *he* has been, or will be, injured before standing is recognized. *Warth* v. *Seldin,* 422 U.S. 490 (1975). Plaintiff's theory of injury is somewhat unclear, but sufficient facts have been alleged at this stage to support his claim of injury in fact. Under the Salary Act and the Adjustment Act the status quo as to congressional salaries may be altered without affirmative action by both Houses of Congress. While salaries may be changed in the traditional fashion, the availability of the procedures created by the statutes under attack make the vote of any single affected Congressman somewhat less efficacious.

In 1969, congressional salaries were raised by the new process for the first time. But Mr. Pressler was not yet a member of Congress and cannot claim his vote was impaired. In 1974, a proposed salary increase was vetoed by a Senate Resolution. The status quo was unaltered and we can see no injury to Mr. Pressler, though he was then a Congressman. While the next Commission should report to the President shortly, any injury from this action is far too speculative to support standing.

However, in October, 1975, congressional salaries, including Mr. Pressler's, were raised under the Adjustment Act. This change was effected without action by the House and Senate. This circumvention of the traditional legislative process impaired the efficacy of Mr. Pressler's vote. He has, therefore, standing to challenge the Adjustment Act. But that Act increases, on a percentage basis, the compensation as determined by Salary Act procedures. For this reason, Congressman Pressler has standing to challenge both pieces of legislation. Accordingly, standing will be afforded under the unique circumstances of this particular case.

II. *Ascertainment Clause*

Turning to the merits, the Court is asked to interpret the meaning and effect of the ascertainment clause in Article I, Section 6, of the Constitution. This is a matter of first impression.

Plaintiff contends that the phrase "to be ascertained by Law" constitutes an explicit mandatory requirement that whenever the compensation of members of Congress is redetermined it must be fixed at that time by a law that specifically states the amount to be paid and that the proposal, like any law, should then be open for debate and vote by the members of each House. Plaintiff urges, in short, that Congress is required itself to fix its pay and that that responsibility in this regard cannot, in effect, be delegated or by-passed in the fashion provided by the Salary Act and the Adjustement Act which allows periodic pay increases to take effect without affirmative congressional action.

For the reason set forth below, it appears to the Court that plaintiff's grievance is directed to what is essentially a matter of form rather than substance, and that Congress has established its compensation "by law" within the requirements of Article I, Section 6, when that section is read, as it must be, against accepted principles governing interpretation of the Constitution as a whole.

At the outset it should be noted that when Congress passed the Acts governing its compensation it acted "by law," as plaintiff himself concedes. The suggestion is, though, that the ascertainment is by others, not by the Congress. However, not only does the Commission which recommends pay levels contain members representing each House of Congress, but even in this circumstance the delegation is not absolute. When the President submits recommendations either House, acting alone, can by negative vote prevent the recommendations from taking effect. And

Congress has not stopped here. In the Salary Act it has explicitly reserved the right to enact legislation fixing congressional compensation regardless of what recommendation it receives from the President. As already noted, it also retains this right under the Adjustment Act by the use of its appropriation powers. Congress, by law, recently rejected an Adjustment Act pay increase by asserting its continuing authority always to fix its own pay.

Thus, it only remains to consider whether or not the verb "ascertain" has such a narrow and limiting effect that, as a matter of constitutional law, it was intended to prevent the Congress from developing rational procedures of this type for fixing congressional compensation by means other than enacting a specific statute fixing each pay change. Unfortunately no light is thrown on this subject by *The Federalist Papers* or the constitutional debates. As plaintiff's own research shows, there was much discussion of whether the states or the Congress itself should establish the level of congressional compensation. Various formulas were suggested, including fixing the amount in the Constitution itself, having it fluctuate depending on the average market value of a bushel of wheat, or determined by a special jury panel. None of this discussion, however, throws any significant light on the meaning of the word "ascertain." The most these historical sources reflect is that the Founding Fathers felt that the Congress should have ultimate responsibility for determining by law what the compensation of its own members should be, as opposed to the suggestion that this final responsibility be delegated to others. It was the eventually accepted view that if Congress acted irresponsibly in setting salaries, members would be held responsible by the voters. Congress has retained this ultimate responsibility and indeed has asserted it on more than one occasion

Congress continues to be responsible to the public for the level of pay its members receive. There is no conceal-

ment; indeed publication of the suggested rate of pay occurs in advance of the pay level taking effect. Moreover, with the growing complexity of all governmental functions a reasonable effort to coordinate congressional pay with pay in the Executive and Judicial branches was certainly not intended to be foreclosed by the ascertainment phase. Congress must always account to the people for what it pays itself, but the Founding Fathers did not contemplate the inflexibility and rigidity which plaintiff seeks.

Repeatedly during the discussions preceding its adoption, our founders sought to preserve in the Constitution a flexible approach to government that would facilitate accommodation to changing conditions and experience. The Constitution is not to be parsed in the narrow, rigid, pedantic manner of a statute. It must remain flexible and adaptable, placing reliance upon the checks-and-balances built into our tripartite format and the sound attitude of voters expected at the polls. The "necessary and proper" clause of Section 7 of the same Article is but one expression of this sound approach. *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819).

The Salary Act and the Adjustment Act fix congressional compensation by law and these statutes are not prohibited by Article I, Section 6. Neither of these Acts insofar as they govern ascertainment of congressional compensation contravene the Constitution. Accordingly, plaintiff's motion for summary judgment is denied and the complaint is dismissed.

So Ordered.

/s/ illegible
United States Circuit Judge
/s/ illegible
United States District Judge
/s/ illegible
United States District Judge

October 12, 1976

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Caption Omitted in Printing)

Notice of Appeal to The Supreme Court of the United States

I. Notice is hereby given that the plaintiff above named hereby appeals to the Supreme Court of the United States from the final judgment of the United States District Court for the District of Columbia, sitting as a three-judge district court pursuant to 28 U.S.C. § 2284, denying plaintiff's motion for summary judgment and dismissing the complaint entered in this action on October 12, 1976.

This appeal is taken pursuant to 28 U.S.C. § 1253.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript all necessary items to effect the appeal.

III. The following questions are presented by this appeal:

1. Whether those sections of the Postal Revenue and Salary Act of 1967, 2 U.S.C. §§ 351 *et seq.* violate Article I, Sections 1 and 6 of the United States Constitution, both on their face and as applied.

2. Whether the section of the Executive Salary Cost-of-Living Adjustment Act of 1975, 2 U.S.C. § 31, violates Article I, Sections 1 and 6 of the United States Constitution, both on its face and as applied.

/s/ LARRY PRESSLER, M. C.
Larry Pressler, M. C.
Pro se
1238 Longworth House Office Bldg.
Washington, D.C. 20515
Telephone: 202-225-2801

(*Proof of Service* Omitted in Printing)

APPENDIX C

2 U.S.C. §§ 351-361

§ 351. Establishment of Commission.

There is hereby established a Commission to be known as the Commission on Executive, Legislative, and Judicial Salaries (hereinafter referred to as the "Commission").

* * * * * * * * * *

§ 352. Membership of Commission; appointment; Chairman; term of office; vacancies; compensation; expenses; allowances.

(1) The Commission shall be composed of nine members who shall be appointed from private life, as follows:

(A) three appointed by the President of the United States, one of whom shall be designated as Chairman by the President;

(B) two appointed by the President of the Senate;

(C) two appointed by the Speaker of the House of Representatives; and

(D) two appointed by the Chief Justice of the United States.

(2) The terms of office of persons first appointed as members of the Commission shall be for the period of the 1969 fiscal year of the Federal Government, except that, if any appointment to membership on the Commission is made after the beginning and before the close of such fiscal year, the term of office based on such appointment shall be for the remainder of such fiscal year.

(3) After the close of the 1969 fiscal year of the Federal Government, persons shall be appointed as members of the Commission with respect to every fourth fiscal year following the 1969 fiscal year. The terms of office of persons so appointed shall be for the period of the fiscal year with respect to which the appointment is made, except that,

if any appointment is made after the beginning and before the close of any such fiscal year, the term of office based on such appointment shall be for the remainder of such fiscal year.

(4) A vacancy in the membership of the Commission shall be filled in the manner in which the original appointment was made.

(5) Each member of the Commission shall be paid at the rate of $100 for each day such member is engaged upon the work of the Commission and shall be allowed travel expenses, including a per diem allowance, in accordance with section 5703(b) of Title 5, when engaged in the performance of services for the Commission.

* * * * * * * * * *

§ 353. Executive Director; additional personnel; detail of personnel of other agencies.

(1) Without regard to the provisions of Title 5 governing appointments in the competitive service, and the provisions of chapter 51 and subchapter III of chapter 53 of such title, relating to classification and General Schedule pay rates, and on a temporary basis for periods covering all or part of any fiscal year referred to in section 352 (2) and (3) of this title—

(A) the Commission is authorized to appoint an Executive Director and fix his basic pay at the rate provided for level V of the Executive Schedule by section 5316 of Title 5; and

(B) with the approval of the Commission, the Executive Director is authorized to appoint and fix the basic pay (at respective rates not in excess of the maximum rate of the General Schedule in section 5332 of Title 5) of such additional personnel as may be necessary to carry out the function of the Commission.

(2) Upon the request of the Commission, the head of any department, agency, or establishment of any branch of the Federal Government is authorized to detail, on a reimbursable basis, for periods covering all or part of any fiscal year referred to in section 352 (2) and (3) of this title, any of the personnel of such department, agency, or establishment to assist the Commission in carrying out its function.

* * * * * * * * * *

§ 354. Use of United States mails by Commission.

The Commission may use the United States mails in the same manner and upon the same conditions as other departments and agencies of the United States.

* * * * * * * * * *

§ 355. Administrative support services.

The Administrator of General Services shall provide administrative support services for the Commission on a reimbursable basis.

* * * * * * * * * *

§ 356. Functions of Commission.

The Commission shall conduct, in each of the respective fiscal years referred to in section 352 (2) and (3) of this title, a review of the rates of pay of—

(A) Senators, Members of the House of Representatives, and the Resident Commissioner from Puerto Rico;

(B) offices and positions in the legislative branch referred to in sections 136a and 136a-1 of this title, sections 42a and 51a of Title 31, sections 162a and 162b of Title 40, and section 39a of Title 44;

(C) justices, judges, and other personnel in the judicial branch referred to in sections 402(d) and 403 of the Federal Judicial Salary Act of 1964;

(D) offices and positions under the Executive Schedule in subchapter II of chapter 53 of Title 5; and

(E) the Governors of the Board of Governors of the United States Postal Service appointed under section 202 of Title 39.

Such review by the Commission shall be made for the purpose of determining and providing—

(i) the appropriate pay levels and relationships between and among the respective offices and positions covered by such review, and

(ii) the appropriate pay relationships between such offices and positions and the offices and positions subject to the provisions of chapter 51 and subchapter III of chapter 53 of the Title 5, relating to classification and General Schedule pay rates.

* * * * * * * * * *

§ 357. Report to the President.

The Commission shall submit to the President a report of the results of each review conducted by the Commission of the offices and positions within the purview of subparagraphs (A), (B), (C), and (D) of section 356 of this title, together with its recommendations. Each such report shall be submitted on such date as the President may designate but not later than January 1 next following the close of the fiscal year in which the review is conducted by the Commission.

* * * * * * * * * *

§ 358. Recommendations of the President to Congress.

The President shall include, in the budget next transmitted by him to the Congress after the date of the submission of the report and recommendations of the Commission under section 357 of this title, his recommendations with respect to the exact rates of pay which he deems advisable, for those offices and positions within the purview of subparagraphs (A), (B), (C), and (D) of section 356 of this title. As used in this section, the term "budget" means the budget referred to in section 11 of Title 31.

* * * * * * * * * *

§ 359. Same; effective date.

(1) Except as provided in paragraph (2) of this section, all or part (as the case may be) of the recommendations of the President transmitted to the Congress in the budget under section 358 of this title shall become effective at the beginning of the first pay period which begins after the thirtieth day following the transmittal of such recommendations in the budget; but only to the extent that, between the date of transmittal of such recommendations in the budget and the beginning of such first pay period—

(A) there has not been enacted into law a statute which establishes rates of pay other than those proposed by all or part of such recommendations,

(B) neither House of the Congress has enacted legislation which specifically disapproves all or part of such recommendations, or

(C) both.

(2) Any part of the recommendations of the President may, in accordance with express provisions of such recommendations, be made operative on a date later than the date on which such recommendations otherwise are to take effect.

* * * * * * * * * *

§ 360. Same; effect on existing law and prior recommendations.

The recommendations of the President transmitted to the Congress immediately following a review conducted by the

Commission in one of the fiscal years referred to in section 352 (2) and (3) of this title shall be held and considered to modify, supersede, or render inapplicable, as the case may be, to the extent incosistent therewith—

(A) all provisions of law enacted prior to the effective date or dates of all or part (as the case may be) of such recommendations (other than any provision of law enacted in the period specified in paragraph (1) of section 359 of this title with respect to such recommendations), and

(B) any prior recommendations of the President which take effect under this chapter.

* * * * * * * * * *

§ 361. Publication of recommendations.

The recommendations of the President which take effect shall be printed in the Statutes at Large in the same volume as public laws and shall be printed in the Federal Register and included in the Code of Federal Regulations.

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No. 76-1005

In the Supreme Court of the United States

OCTOBER TERM, 1976

LARRY PRESSLER, APPELLANT

v.

W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF THE SECRETARY OF THE TREASURY TO AFFIRM

WADE H. McCREE, JR.,
Solicitor General,
BARBARA ALLEN BABCOCK,
Assistant Attorney General,
WILLIAM KANTER,
ANTHONY J. STEINMEYER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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CITATIONS

231-943—77——1

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76–1005

LARRY PRESSLER, APPELLANT

v.

W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF THE SECRETARY OF THE TREASURY TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the Solicitor General, on behalf of the Secretary of the Treasury, moves to affirm the judgment of the district court.

OPINION BELOW

The *per curiam* opinion of the district court (J.S. App. 1a–8a) is not yet reported.

JURISDICTION

The judgment of the three-judge district court was entered on October 12, 1976. A notice of appeal to

this Court (J.S. App. 9a–10a) was filed on October 22, 1976. On December 16, 1976, the Chief Justice extended the time for docketing the appeal to and including January 20, 1977. The jurisdictional statement was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

QUESTION PRESENTED

Whether certain of the procedures contained in the Postal Revenue and Federal Salary Act of 1967 and the Executive Salary Cost-of-Living Adjustment Act of 1975, which govern the setting of new rates of compensation for members of Congress, are constitutional.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 1, of the Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article I, Section 6, of the Constitution provides in pertinent part:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. * * *

Section 225 of the Postal Revenue and Federal Salary Act of 1967, 81 Stat. 642, 2 U.S.C. 351–361, is set forth at J.S. App. 11a–16a. Section 204(a) of the Executive Salary Cost-of-Living Adjustment Act of 1975, Pub. L. 94–82, 89 Stat. 421, 2 U.S.C. (Supp. V) 31, is set forth in pertinent part at J.S. 3–4.

STATEMENT

Appellant, a member of the House of Representatives since 1975 (see J.S. App. 1a), challenges in this action the constitutionality of certain of the statutory provisions by which the salaries of Senators and Representatives are determined. The first of these provisions, Section 225 of the Postal Revenue and Federal Salary Act of 1967, 81 Stat. 642, 2 U.S.C. 351–361 ("Salary Act"), established a Commission on Executive, Legislative, and Judicial Salaries ("Commission"), composed of nine members.[1] The Commission recommends to the President, once every four years, specific pay rates for Senators, Representatives, federal judges, and certain other officials in the Legislative, Executive, and Judicial Branches. 2 U.S.C. 356, 357. After receiving the Commission's report, the President is required to include in the next budget he submits to Congress "his recommendations with respect to the exact rates of pay which he deems advisable, for [specified] offices and positions within the purview of [the Salary Act]." 2 U.S.C. 358. The rates of pay recommended by the President become effective for the first pay period beginning thirty days after submission of the recommendations, or on a later date specified by the President, unless (1) Congress enacts a statute providing for rates of pay other than those the President has proposed or (2) either House of Congress "enact[s] legislation which specifically

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[1] Three members of the Commission are appointed by the President, and two members each are appointed by the President of the Senate, the Speaker of the House and the Chief Justice. 2 U.S.C. 352.

disapproves all or part of such recommendations * * *." 2 U.S.C. 359.

The Commission submitted its first quadrennial report to the President in December 1968. The Commission recommended in that report, *inter alia,* that congressional salaries be increased from $30,000 to $50,000 per annum. 115 Cong. Rec. 2690 (1969). After discussing the Commission's recommendations with congressional leaders, the President recommended in the budget he submitted to Congress on January 15, 1969, that congressional salaries be increased to $42,500 per annum. See 115 Cong. Rec. 2705 (1969). The Senate debated extensively a resolution (S. Res. 82, 91st Cong., 1st Sess. (1969)) disapproving all of the pay raises the President had proposed, but ultimately rejected the resolution by a vote of 47 to 34. 115 Cong. Rec. 2677–2716 (1969). A similar resolution was introduced in the House (H.R. Res. 133, 91st Cong., 1st Sess. (1969)) but was not reported out of committee. See 115 Cong. Rec. D40 (1969). The President's recommendations therefore became effective for the first pay period beginning after February 14, 1969. 34 Fed. Reg. 2241.

The Commission submitted its second report to the President in June 1973. The President thereafter proposed in the budget he submitted to Congress that the salaries of members of Congress be increased to $52,800 per annum over a three-year period. See H.R. Rep. 93–870, 93d Cong., 2d Sess. 3 (1974). The Senate Committee on Post Office and Civil Service reported a resolution (S. Res. 293, 93d Cong., 2d Sess. (1974)) disapproving this increase but approving the increases recommended by the President for all other officials covered by the Salary Act. The resolution was amended on the floor, however, and was passed in a form disapproving all of the salary adjustments the President had proposed.[2] 120 Cong. Rec. 5492–5508 (1974).[3]

The second statutory provision at issue is Section 204(a) of the Executive Salary Cost-of-Living Adjustment Act of 1975, Pub. L. 94–82, 89 Stat. 421, 2 U.S.C. (Supp. V) 31 ("Adjustment Act"). Prior to enactment of the Adjustment Act, members of Congress, federal judges, and certain other high-ranking government officials were excluded from the Federal Pay Comparability Act of 1970, 5 U.S.C. 5301 *et seq.,* which authorizes annual cost-of-living adjustments to the salaries of federal employees governed by General Schedule ("GS") pay rates and other specified statutory pay systems. The Adjustment Act extended the provisions of the Federal Pay Comparability Act to these previously excluded government officials. Section 204(a) of the Adjustment Act, which deals specifically with congressional salaries, provides for annual adjustments computed

[2] A similar resolution disapproving the salary increases proposed by the President was introduced in the House (H.R. Res. 807, 93d Cong., 2d Sess. (1974)) and was reported out of committee. No further action was taken on the resolution, however, because of passage of the Senate resolution disapproving the proposed salary increases.

[3] The validity of the Senate's action is at issue in *Atkins* v. *United States*, Ct. Cl., Nos. 41–76, 132–76, and 357–76 (judges' pay), and *McCorkle* v. *United States*, C.A. 4, No. 76–1479 (civil servants' pay).

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by reference to the annual cost-of-living increases given employees subject to the GS pay system.

The amount of annual salary adjustments authorized under the Federal Pay Comparability Act is determined in accordance with the detailed standards prescribed at 5 U.S.C. (and Supp. V) 5305(a) and (b). But if the President concludes that a national emergency or economic conditions affecting the general welfare make such adjustments inappropriate, he may submit an alternative adjustment plan to Congress before September 1 of the year in which the adjustment is scheduled to become effective. 5 U.S.C. (Supp. V) 5305(c)(1). The cost-of-living increases proposed in the alternative plan become effective unless the plan is disapproved by resolution of either House of Congress, in which event the adjustments originally computed become effective. 5 U.S.C. 5305 (c)(2) and (m). See *National Treasury Employees Union* v. *Nixon,* 492 F. 2d 587 (C.A.D.C.).

On October 6, 1975, the President ordered cost-of-living adjustments averaging 4.94 percent to be made in the salaries of employees subject to the GS pay system. Executive Order 11883, 40 Fed. Reg. 47091. Those increases became effective on or shortly after October 1, 1975. At the same time, congressional salaries also were increased by 4.94 percent (from $42,500 to $44,600) pursuant to Section 204(a) of the Adjustment Act (40 Fed. Reg. 47099).

Appellant filed the present suit on May 7, 1976, seeking to enjoin any further increases in congressional salaries under either the Salary Act or the Adjustment Act. On October 12, 1976, a three-judge district court, convened pursuant to 28 U.S.C. 2282, dismissed the complaint (J.S. App. 1a–8a).[4] The district court held that appellant had standing as a congressman, but not as a citizen or taxpayer, to challenge the statutory procedures by which the salaries of members of Congress are determined. The court based that holding on appellant's allegation that his legislative vote "was impaired by the failure of other members of Congress to assume an affirmative responsibility specifically placed on them by language of the Constitution" (J.S. App. 4a). But the court rejected appellant's position on the merits, holding that the Salary Act and the Adjustment Act satisfy the requirement of Article I, Section 6, of the Constitution that congressional salaries "be ascertained by Law" (J.S. App. 6a–8a).[5]

[4] On October 1, 1976, after the present suit had been filed but before the court had dismissed the complaint, the President announced that further cost-of-living adjustments averaging 4.83 percent would be implemented for the first pay period after October 1, 1976. Executive Order 11941, 41 Fed. Reg. 43889. Such adjustment would have increased congressional salaries to $46,800 per annum. The adjustment was not implemented, however, because Congress specifically refused to appropriate the necessary funds in the Legislative Branch Appropriation Act of 1977, Pub. L. 94–440, 90 Stat. 1439. See H.R. Conf. Rep. No. 94–1559, 94th Cong., 2d Sess. 3 (1976).

[5] On December 2, 1976, after the court had dismissed the complaint, the Commission submitted to the President its third quadrennial report under the Salary Act. The Commission's report recommended average salary increases of 36.4 percent for federal employees subject to the Salary Act, contingent upon the adoption

ARGUMENT

The district court correctly rejected appellant's contention that the Ascertainment Clause, Article I, Section 6, of the Constitution, requires the enactment of a statute prescribing specific dollar amounts of compensation for members of Congress. Accordingly, plenary review by this Court is not warranted. We submit, moreover, that appellant lacks standing to challenge the statutory provisions by which congressional salaries are determined and that such challenge presents a nonjusticiable political question.

1. The district court correctly rejected appellant's contention (see J.S. 16) that the only procedure that satisfies the requirement of Article I, Section 6, that congressional salaries be "ascertained by Law" is enactment of a statute prescribing a specific dollar amount that may be paid in compensation. As the district court pointed out, "[t]he Constitution is not to be parsed in the narrow, rigid, pedantic manner

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of a code of public conduct (1) requiring disclosure by certain officials of all outside sources of income, (2) restricting the nature and amounts of such income, (3) applying conflict-of-interest restrictions upon investments, (4) limiting expense allowances and (5) restricting the nature of post-government employment. In the budget submitted to Congress on January 17, 1977, the President recommended salary increases slightly lower than those the Commission had recommended. The President also endorsed the Commission's proposed code of conduct. 13 Weekly Comp. Pres. Docs. 50–51 (1977). Neither House of Congress disapproved the salary recommendations contained in the President's budget, and the increases accordingly became effective on February 20, 1977. By virtue of this latest increase, members of Congress currently are being paid at the rate of $57,500 per annum.

of a statute" (J.S. App. 8a). See *McCulloch* v. *Maryland,* 4 Wheat. 316, 407. In discussing the analogous Appropriations Clause, Article I, Section 9, clause 7, which requires "a regular Statement and Account of the Receipts and Expenditures of all public Money * * *," this Court stated that "Congress has plenary power to exact any reporting and accounting it considers appropriate in the public interest" (*United States* v. *Richardson,* 418 U.S. 166, 178 n. 11). The inflexible construction appellant advocates for the Ascertainment Clause is thus contrary to established principles for construing congressional powers under Article I.[6]

Indeed, Congress frequently controls the amount of compensation to be paid federal officers and employees by prescribing the standards and procedures to be used rather than by setting specific dollar

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[6] The validity of the provision of the Salary Act (2 U.S.C. 359) permitting a single House of Congress, acting alone, to disapprove a pay increase recommended by the President is at issue in two other pending cases. *Atkins* v. *United States*, *supra*, and *McCorkle* v. *United States*, *supra*. The validity of a similar "one-house veto" provision was discussed but not resolved in *Buckley* v. *Valeo*, 424 U.S. 1, 140 n. 176 (*per curiam*); compare *id. at* 284–285. (White, J., concurring in part and dissenting in part). In *Atkins* v. *United States*, *supra*, the government has argued that the one-house veto provision of the Salary Act is unconstitutional and is not severable from the remainder of that statute. But appellant has not challenged the one-house veto provision of the Salary Act; indeed, he argues that the procedures he has challenged are severable from the procedures at issue in *Atkins* (J.S. 22-23). Thus, this appeal does not present an appropriate vehicle for consideration by this Court of the validity of the one-house veto provision of the Salary Act.

amounts. Appellant does not contend, for example, that Article I requires Congress to do more than prescribe the procedures and standards to be used in determining the amount of the annual cost-of-living increase to be given employees subject to the GS pay system (5 U.S.C. (and Supp. V) 5305) (see J.S. 22), the amount of Civil Service retirement benefits (5 U.S.C. 8340), or the *per diem* rate for travel by government officials (5 U.S.C. (Supp. V) 5702). Similarly, the Tariff Act of 1930, 46 Stat. 590, as amended, 19 U.S.C. 1202, delegated to the Executive the task of setting specific rates to be charged for dutiable goods. Such examples demonstrate the flexibility accorded and frequently utilized by Congress under Article I of the Constitution in controlling both expenditures and revenues.

The fact that Congress has chosen in the Salary Act and the Adjustment Act to prescribe the procedures and standards by which congressional compensation is determined, but not to set specific dollar amounts, does not mean that such compensation is not "ascertained by Law." The history of the Ascertainment Clause reveals that the Framers intended only that congressional salaries be a matter of public record (see J.S. 13–15). The procedures challenged by appellant are fully consistent with the goal of public accountability. Congress remains accountable for compensation paid pursuant to statutes that it has enacted and can revise. In addition, Congress can refuse to appropriate funds for a salary increase authorized to be paid under either the Salary Act

or the Adjustment Act—a power that Congress exercised in 1976 (see note 4, *supra*). As the district court correctly concluded (J.S. App. 7a–8a):

> Congress continues to be responsible to the public for the level of pay its members receive. There is no concealment; indeed publication of the suggested rate of pay occurs in advance of the pay level taking effect. Moreover, with the growing complexity of all governmental functions a reasonable effort to coordinate congressional pay with pay in the Executive and Judicial branches was certainly not intended to be foreclosed by the ascertainment phrase. Congress must always account to the people for what it pays itself, but the Founding Fathers did not contemplate the inflexibility and rigidity which [appellant] seeks.

Appellant contends (J.S. 17, 19) that the procedures pursuant to which congressional salaries are determined are deficient because they do not provide him with an opportunity to record his vote for or against a proposed adjustment. Even if congressional salaries were adjusted in the manner appellant advocates, appellant's desire to have his vote recorded would not necessarily be respected. Article I, Section 5, clause 3, of the Constitution provides for recording the votes of the members of either House only "at the Desire of one fifth of those present * * *." Thus, as an individual legislator—the capacity in which appellant has pursued this action—appellant would not be assured under his view of the Ascertainment Clause

of an opportunity to inform his constituents of his position on a proposed pay increase by means of a recorded vote. Appellant could accomplish the same result, of course, by speaking out against any proposed pay increase. But he retains that right under the Salary Act and the Adjustment Act.

2. Dismissal of the complaint also was warranted because appellant lacks standing. Insofar as appellant has relied here upon his status as a citizen and taxpayer, appellant has asserted only a "generalized grievance[] about the conduct of government * * *" (*Flast* v. *Cohen,* 392 U.S. 83, 106). That grievance, if any, is shared in substantially equal measure by all citizens and taxpayers, and is not a sufficient basis for appellant's invocation of the judicial process. *Richardson* v. *Kennedy,* 313 F. Supp. 1282 (W.D. Pa.) (three-judge court), affirmed, 401 U.S. 901; see *Schlesinger* v. *Reservists to Stop the War,* 418 U.S. 208, 220; *United States* v. *Richardson, supra,* 418 U.S. at 173; *Ex parte Levitt,* 302 U.S. 633, 634; *Massachusetts* v. *Mellon,* 262 U.S. 447, 488; *Fairchild* v. *Hughes,* 258 U.S. 126, 129–130.

Appellant also lacks standing as a congressman. He has not alleged that the efficacy of any vote he has cast or may cast in the future has been nullified or diminished. Rather, he complains that under the Salary Act and the Adjustment Act congressional salaries can be adjusted without his casting a vote. If adjustments under those statutes during appellant's tenure as a congressman had reduced his compensation, appellant might be able to advance at least an arguable claim of concrete injury. But the two

adjustments to appellant's salary made during his tenure in office have increased the amount of compensation to which he is entitled;[7] consequently, his only plausible claim of injury is that governmental expenditures are being increased in an unconstitutional manner. Such a claim, without more, is too generalized to support appellant's standing (*e.g., United States* v. *Richardson, supra*), particularly since as a congressman appellant can vote upon the appropriations bills needed to implement any proposed salary increase for members of Congress.

In fact, appellant did vote with a majority of his colleagues in refusing to appropriate funds for the most recent cost-of-living increase authorized under the Adjustment Act. 122 Cong. Rec. H9365–H9375 (daily ed., September 1, 1976). The fact that appellant failed to muster sufficient support among his colleagues to block the two salary increases that have become effective during his tenure does not establish the existence of a judicially cognizable injury. See, *e.g., Harrington* v. *Bush,* C.A.D.C., No. 75–1862, de-

[7] In the past, appellant has donated part of his increased compensation to charity (see J.S. 22–23). But he has retained some of the increased compensation he has received under the statutes he challenges in this litigation (*ibid.*), and thus must ask this Court to violate the principle of " 'not pass[ing] upon the constitutionality of a statute at the instance of one who has availed himself of its benefits' " (*Fahey* v. *Mallonee*, 332 U.S. 245, 255, quoting from *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348 (Brandeis, J., concurring)). Although this principle has been "applied unevenly in the past" (*Arnett* v. *Kennedy*, 416 U.S. 134, 153 (plurality opinion)), it nevertheless presents an additional obstacle to appellant's efforts to establish the existence of a personal injury in fact.

cided February 18, 1977; *Metcalf* v. *National Petroleum Council,* C.A.D.C., No. 76–1223, decided February 18, 1977;[8] *Harrington* v. *Schlesinger,* 528 F. 2d 455 (C.A. 4); *Korioth* v. *Briscoe,* 523 F. 2d 1271 (C.A. 5); *Holtzman* v. *Schlesinger,* 484 F. 2d 1307 (C.A. 2), certiorari denied, 416 U.S. 936.

3. Finally, dismissal of the complaint was warranted because the only issue presented is a nonjusticiable political question. The history of the Ascertainment Clause recounted by appellant (J.S. 13–15) confirms that congressional compensation is a matter committed in the Constitution to the Legislative Branch, subject to the check of public opinion. See *Baker* v. *Carr,* 369 U.S. 186, 217. As a member of the Legislative Branch, appellant has a continuing opportunity to have the views he seeks to advance in this litigation adopted through the political process.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BARBARA ALLEN BABCOCK,
Assistant Attorney General.

WILLIAM KANTER,
ANTHONY J. STEINMEYER,
Attorneys.

APRIL 1977.

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[8] Limiting *Mitchell* v. *Laird*, 488 F. 2d 611 (C.A.D.C.), and *Kennedy* v. *Sampson*, 511 F. 2d 430 (C.A. D.C.).

U.S. GOVERNMENT PRINTING OFFICE: 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1005

LARRY PRESSLER, Member, United States House of Representatives, *Appellant,*

v.

W. MICHAEL BLUMENTHAL, Secretary of the Treasury,

FRANCIS R. VALEO, Secretary of the United States Senate,

KENNETH R. HARDING, Sergeant-at-Arms of the United States House of Representatives, *Appellees.*

On Appeal from the United States District Court for the District of Columbia

MOTION OF APPELLEE KENNETH R. HARDING TO DISMISS OR AFFIRM AND SUGGESTION OF MOOTNESS

EUGENE GRESSMAN
1828 L Street, N.W.
Washington, D.C. 20036
Counsel for Appellee
Kenneth R. Harding

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MOTION OF APPELLEE KENNETH R. HARDING TO DISMISS OR AFFIRM AND SUGGESTION OF MOOTNESS

The appellee Kenneth R. Harding, Sergeant-at-Arms of the United States House of Representatives, respectfully moves to dismiss or affirm the judgment of the United States District Court for the District of Columbia in this case. Rule 16(1)(c) and (d).

The motions filed by the two other appellees have fully set forth the facts and the statutes involved. Those matters need not be repeated here.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 1

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article I, Section 6

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. . . .

Article I, Section 8, cl. 18

The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

QUESTIONS PRESENTED

1. Whether the appellant, as a sitting Member of the House of Representatives, has standing before this Court to challenge the constitutionality of the procedures established in the Salary Act of 1967 and the Adjustment Act of 1975 for ascertaining the compensation to be received by Senators and Representatives.

2. Whether a constitutional challenge to the methods chosen by Congress to ascertain the compensation to be received by Senators and Representatives, pursuant to Article I, Section 6, raises a political and non-

justiciable question that has been textually and totally committed by the Constitution to the Congress.

3. Whether the various procedures chosen by Congress for ascertaining compensation under the Salary Act of 1967 and the Adjustment Act of 1975 are constitutionally permissible as being "necessary and proper" methods, within the meaning of Article I, Section 8, cl. 18, for carrying into execution the power vested in Congress by Article I, Section 6, to ascertain by law the compensation of Senators and Representatives.

MOTION TO DISMISS

The appellee Harding hereby moves to dismiss the appeal on the ground that no justiciable case or controversy exists within the meaning of Article III of the Constitution. The nonjusticiability of this appeal is obvious for two reasons: (1) the appellant lacks standing to process this appeal; and (2) the appeal presents only questions that are political in nature and hence beyond the scope of judicial review. And, as was said in *Schlesinger* v. *Reservists Committee to Stop the War,* 418 U.S. 208, 215 (1974), "either the absence of standing or the presence of a political question suffices to prevent the power of the judiciary from being invoked by the complaining party."

A. The Appellant Lacks Standing To Process the Appeal to This Court

While the three-judge court below held that the appellant had standing to assert his claims "under the unique circumstances of this particular case" (J.S. App. 5a), that determination is not binding on this Court. It is the "usual rule in federal cases . . . that an actual

controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated." *Roe* v. *Wade,* 410 U.S. 113, 125 (1973); *DeFunis* v. *Odegaard,* 416 U.S. 312, 319 (1974). This Court, in other words, must make an independent evaluation of appellant's standing at this appellate stage of the case.

In his complaint (¶ 3), appellant identified himself as a citizen and taxpayer of the United States and a Member of the House of Representatives. The court below properly rejected (J.S.App. 4a) appellant's claimed standing as a citizen and taxpayer, citing the one case directly in point holding that a citizen taxpayer lacks standing to challenge the Salary Act of 1967 as contrary to Article I, Section 6. *Richardson* v. *Kennedy,* 401 U.S. 901 (1971), affirming 313 F.Supp. 1282 (W.D.Pa. 1970).[1]

The court below, however, plainly erred in according appellant standing, in the Article III sense, with respect to his status as a sitting Member of the House of Representatives. In an attempt to satisfy the constitutional requirement that there be some actual or

[1] Appellant asserted in his complaint (¶¶ 14, 15) that (1) as a United States citizen, he had been deprived of "his right to have Members of Congress accountable for increases authorized in their compensation;" and (2) as a United States taxpayer, he had been deprived of his right to have tax monies received by the Federal Government expended pursuant to laws enacted in accordance with the Constitution of the United States."

Each of these asserted harms is nothing more than a "generalized grievance" shared in substantially equal measure by all or a large class of citizens and taxpayers. Such harm normally does not warrant exercise of a federal court's jurisdiction. *Warth* v. *Seldin,* 422 U.S. 490, 499 (1975); *Flast* v. *Cohen,* 392 U.S. 83, 106 (1968).

threatened injury to sustain his standing in this respect, appellant alleged in his complaint (¶ 16) that the appellees had injured and will continue to injure him

> "... as a Member of the United States House of Representatives by interfering with the performance of his constitutional responsibilities and congressional duties and by depriving him of his constitutional right to vote on each adjustment proposed in congressional salaries."

But neither those allegations nor the facts of record supply the injury or threat of injury so essential to the concept of standing.

(1) Appellant cannot acquire standing by erroneously asserting that his individual "constitutional responsibilities and congressional duties" have been interfered with by the actions of Congress pursuant to Article I, Section 6. That portion of the Constitution imposes "responsibilities" and "duties" on Congress, not on the individual Members thereof. And since appellant does not sue on behalf of Congress, he has no standing to complain of an alleged interference with the responsibilities of a third party, the Congress. See *Tileston* v. *Ullman,* 318 U.S. 44 (1943); *Warth* v. *Seldin,* 422 U.S. 490, 499 (1975).

(2) To the extent that appellant has particularized his alleged injury by referring to an interference with "his constitutional right to vote on each [proposed salary] adjustment," the appellant's standing is not improved. A Congressman has no "constitutional right" to have any proposed salary adjustment brought to a vote; indeed, there is no constitutional compulsion on Congress to call for a vote on any salary proposal or on any other type of proposal. And in any

event, the vote that triggered the 1975 automatic salary adjustment was the vote to adopt the Adjustment Act itself. That was the critical vote that authorized the mechanical adjustments from time to time. And appellant did in fact cast an unimpaired negative vote with respect to that authorizing statute (121 Cong. Rec. H7858, July 30, 1975).

In very limited situations, where legislative votes have in fact been cast in favor of specific propositions, courts have recognized that the legislators have standing to maintain the effectiveness of their votes from illegal interference by non-legislative sources. *Coleman* v. *Miller,* 307 U.S. 433 (1939); *Kennedy* v. *Sampson,* 511 F.2d 430 (C.A.D.C., 1974).[2] But prior to the decision below, no court had accorded standing to a legislator to protest that the very body of which he is a member has, by allegedly unconstitutional legislation, destroyed the possibility of future roll-call votes by that legislator on a particular kind of proposal. As stated by the Fifth Circuit in *Korioth* v. *Briscoe,* 523 F.2d 1271, 1278 (C.A. 5, 1975), "None of the cases has indicated that a legislator, simply by virtue of that status, has some special right to invoke judicial con-

[2] *Coleman* involved a challenge by state legislators that the lieutenant governor, in a procedure violative of the United States Constitution, had broken a tie vote in a state senate in favor of ratification of a constitutional amendment. This Court held that the plaintiffs had a sufficiently "plain, direct and adequate interest in maintaining the effectiveness of their votes" to give them standing. 307 U.S. at 438.

Kennedy recognized standing in a suit by Senator Kennedy to compel the official publication of a validly enacted law which had remained unpublished because of an attempted, but legally ineffective, pocket veto by the President. The court found that the Senator's "objection in this lawsuit is to vindicate the effectiveness of his vote." 511 F.2d at 436.

sideration of the validity of a statute passed over his objecting vote"—which is a perfect description of appellant's situation.[3]

(3) The attempt of the court below to find standing in appellant's attack upon his own colleagues' legislative actions will not withstand analysis. The opinion acknowledged that appellant alleged impairment of the efficacy of his vote not by the Executive but "by the failure of other members of Congress to assume an affirmative responsibility specifically placed upon them by language of the Constitution" (J.S.App. 4a). It then proceeded to find impairment in the automatic raising of congressional salaries in October of 1975, under the Adjustment Act, "without action by the House and Senate."

Several misconceptions about the constitutional duties of Congress and the legislative process here involved are apparent from that opinion. Certainly no language in the Constitution (Article I, Section 6, in particular) places an "affirmative responsibility" on "other members of Congress" to enact the particular kind of legislation that would provide a roll-call vote for every future salary increase proposal. On the contrary, the ultimate decision by the court below (Part II of its opinion) was that the Adjustment Act and Salary Act procedures that were alleged to impair the efficacy of appellant's vote were indeed "not prohibited by Article I, Section 6" and do not "contravene the Constitution" (J.S.App. 8a). Mr. Pressler's

[3] See also *Holtzman* v. *Schlesinger,* 484 F.2d 1307 (C.A. 2, 1973), certiorari denied, 416 U.S. 936; *Harrington* v. *Schlesinger,* 528 F.2d 455 (C.A. 4, 1975); *Harrington* v. *Bush,* unreported (C.A. D.C., Feb. 18, 1977, No. 75-1862); *Metcalf* v. *National Petroleum Council,* unreported (C.A.D.C., Feb. 18, 1977, No. 76-1223).

colleagues, in other words, were found not to have an "affirmative obligation" to subject all congressional salary increases to the full vote of the House and Senate. How, then, can they be said to have circumvented the traditional legislative process so as to have "impaired the efficacy of Mr. Pressler's vote" (J.S.App. 5a)? Under these circumstances, the appellant's contrary and frivolous allegations cannot confer standing on him to attack a perfectly constitutional legislative process.

(4) Moreover, the court below ignored the critical facts of record that the appellant has at all times possessed the undiminished right to introduce legislation disapproving of all proposed salary increases, repealing the statutory procedures of which he complains, or establishing new levels or standards of congressional compensation. That he has not done so, or that he has been unable to convince a majority of the Congress to support such measures, cannot disguise the fact that his colleagues have in no way impaired the effectiveness of Mr. Pressler's vote on compensation matters.

All that the appellant is asserting is a general complaint about his own legislative ineffectiveness and his own dissatisfaction with the workings of the congressional processes. That assertion cannot create sufficient standing to sustain this appeal.

B. The Appeal Presents Questions That Are Political in Nature

From what has been said above, it becomes readily apparent that this appeal involves the methods chosen by Congress in executing its power under Article I, Section 6, to ascertain its own compensation. The sole

question presented by the appellant (J.S. 2)[4] is a classic illustration of a political question that concerns matters that are totally and textually committed by the Constitution to the Congress. As such, this question cannot and should not be addressed or resolved by the federal judiciary. See *Baker* v. *Carr,* 369 U.S. 186, 217 (1962), reaffirmed in *Powell* v. *McCormack,* 395 U.S. 486, 518-519 (1969).

The entire issue of congressional compensation is committed by Article I, Section 6, of the Constitution to the Congress itself. That obvious fact is further confirmed by the constitutional debates cited by appellant (J.S. 14-15). And the correlative issue of what "methods" Congress can use in implementing that power to ascertain its own compensation brings into focus the authority of Congress under Article I, Section 8, cl. 18, to make all laws "necessary and proper for carrying into Execution" such powers as that contained in Article I, Section 6. The selection of the method deemed "necessary and proper" for executing or implementing any such power vested in Congress is a matter totally committed to the discretion of Congress. Chief Justice Marshall's ruling for the Court in *McCulloch* v. *Maryland,* 4 Wheat. 316, 423 (1819), made it clear that this Court "disclaims all pretensions" to tread on the legislative ground staked out in the "necessary and proper" clause of Article I, Section 8.

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[4] The question there presented is "Whether the *methods* of determining salary rates for Senators and Representatives under section 225 of the Postal Revenue and Salary Act of 1967 and section 204(a) of the Executive Cost-of-Living Adjustment Act of 1975 violate Article I, Sections 1 and 6 of the Constitution because they authorize changes in compensation for members of Congress *without requiring a direct vote* by either House of Congress." [Emphasis added.]

As was said in an analogous context in *Gilligan* v. *Morgan,* 413 U.S. 1, 10 (1973), "It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process."[5]

MOTION TO AFFIRM

Alternatively, the appellee Harding moves to affirm the judgment of the three-judge court that the Salary Act and the Adjustment Act "are not prohibited by Article I, Section 6" and, in their ascertainment of congressional compensation, do not "contravene the Constitution" (J.S. App. 8a).

While the court below noted that the interpretation of the meaning and effect of Article I, Section 6, is "a matter of first impression" (J.S. App. 6a), the court's resolution of the matter is so eminently correct as to warrant an affirmance by this Court. The three-judge court properly refused to give the "ascertained by Law" phrase of Article I, Section 6, a narrow, pedantic reading that would divorce the Compensation Clause from other portions of the Constitution and from the realities of the legislative processes. And it properly

[5] The court below, in footnote 2 of its opinion (J.S. App. 4a), sought to avoid the political question doctrine by stating that where statutes are questioned "under a specific constitutional clause" the political question doctrine is inapplicable "merely because a decision might have political consequences." But the appellees do not rest their political question argument on any such "political consequences." The argument rests, rather, on the constitutional notion that questions committed to the Legislative Branch by the Constitution are "political" in nature and thus outside the realm of judicial scrutiny.

found that the Constitutional Convention confirmed the fact that "Congress should have ultimate responsibility for determining by law what the compensation of its own members should be, as opposed to the suggestion that this final responsibility be delegated to others" (J.S. App. 7a). All that the appellant has done before this Court is to repeat the historical and legal arguments that were fully considered and found wanting by the court below.

Significantly, the appellant totally ignores the lower court's careful coordination of the Compensation Clause with other portions of the Constitution, particularly the Necessary and Proper Clause of Article I, Section 8.[6] It was in that latter clause that the court found constitutional sanction for the "one-House veto" procedures of the Salary Act and the automatic salary adjustment procedures of the Adjustment Act. The court thus adopted the constitutional rationale urged upon it by the appellees Harding and Valeo, a rationale that may be briefly summarized as follows:

(1) Article I, Section 6, of the Constitution vests exclusive power in Congress to "ascertain by Law" the compensation of Senators and Representatives.

(2) Article I, Section 8, cl. 18, of the Constitution vests in Congress the power to make all laws "necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, . . ."

[6] The opinion of the court below, as reprinted in the appendix to the jurisdictional statement, contains an erroneous reference to the "necessary and proper" clause of "Section 7" (J.S. App. 8a). The correct reference is to "Section 8," and the court below ordered that this correction be made in its opinion.

Thus Congress can make whatever laws are deemed "necessary and proper" for carrying the Compensation Clause (Article I, Section 6) "into Execution."

(3) This Court's decision in *McCulloch* v. *Maryland,* 4 Wheat. 316, 421 (1819), interpreted the Necessary and Proper Clause as allowing to Congress "that discretion . . . which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people." And the Court added that such discretionary choices made by Congress that are plainly adapted to carrying a vested power into execution and that "are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." See also *United States* v. *Fisher,* 2 Cranch 358, 396 (1805).

(4) It follows that the challenged procedures for ascertaining compensation under the Salary Act and the Adjustment Act, not being prohibited by the Constitution, are permissible and unreviewable choices by Congress, choices deemed "necessary and proper" to help execute the vested power to ascertain congressional compensation. Appellant's objection (J.S. 17), that these choices are impractical, inadequate and unsuitable, and give the voters no record of where their representatives stand on a salary increase, cannot provide any basis for judicial review of matters so completely embedded in the discretion of Congress. Indeed, the fact that this constitutional analysis inevitably leads one to the vast discretionary reservoir of congressional power known as the Necessary and Proper Clause serves to emphasize the inherently political nature of the constitutional question appellant has asked. The choice of the "one-House veto" or the automatic adjustment procedures is basically a political or discretionary choice to be made by the Congress.

Because the choices here made by Congress are so discretionary and therefore so non-reviewable, the so-called "important questions of public policy" surrounding those choices, as advanced by the appellant (J.S. 21), cannot justify full briefing and oral argument of this appeal. Whether the present scheme of salary adjustments for federal officials is adequate, or whether Congress has been made sufficiently accountable to the public on matters of compensation, are political and practical judgments which no court should address, even as an excuse for assessing a constitutional issue on its merits. And with respect to the sums of public finances said to be at stake, or the appellant's desire to remove "all existing constitutional doubt about the existing legal structure" under his attack (J.S. 21), the essentially political and advisory thrust of those considerations argues against any plenary review by this Court.

The decision below represents a limited but perhaps necessary incursion into the political question arena, and should be affirmed. It properly interprets the Compensation Clause on its face and delineates its place in the constitutional scheme, particularly in relation to the Necessary and Proper Clause. That appears to be all that the federal judiciary can properly say about the "one-House veto" and the automatic salary adjustment provisions of the Salary Act and the Adjustment Act, at least with respect to the ascertainment of congressional compensation.

One final comment remains. The doctrines that compose the concept of Article III justiciability, particularly those of standing, ripeness and political question, may well preclude any federal court from ever reaching the constitutional challenges that have been made

to the highly-publicized "one-House veto" procedure. Thus in *Clark* v. *Valeo,* now pending before this Court as No. 76-1105, the Court of Appeals for the District of Columbia Circuit, on January 21, 1977, found that challenges to that procedure in the federal election laws were not justiciable for reasons of ripeness and judicial prudence, without even reaching the additional problems of standing and political questions. In two other actions as yet unresolved by the lower courts, where challenges have been made to the "one-House veto" provisions of the Salary Act, the courts must first confront serious issues whether such challenges have been presented in a justiciable form. *Atkins, et al.* v. *United States,* Nos. 41-76, 132-76, 357-76 (Ct. Cl.) (judicial salaries); *McCorkle* v. *United States,* No. 76-1479 (C.A. 4) (executive salaries). Overlaying all these cases, in other words, is the Article III requirement that there be a justiciable "case or controversy" in order to permit the judiciary to reach the ultimate constitutional questions about the "one-House veto."

SUGGESTION OF MOOTNESS

On April 4, 1977, the Congress adopted an amendment to § 225(i) of the Salary Act of 1967, 2 U.S.C. § 359(1), that effectively eliminates the "one-House veto" procedures under that Act, about which the appellant complains.[7] As amended, § 225(i) now provides that congressional approval of the President's salary increase recommendations shall be as follows:

> "(1) Within sixty (60) calendar days of the submission of the President's recommendations for the Congress, each House shall conduct a separate vote on each of the recommendations of the President with respect to paragraphs (A) [congressional rates of pay], (B) [rates of pay of certain offices and positions in the legislative branch], (C) [rates of pay of justices, judges and other personnel in the judicial branch], and (D) [rates of pay of offices and positions under the Executive Schedule] of subsection (f) of this section, and shall thereby approve or disapprove the recommendations of the President regarding each such subparagraph. Such votes shall be recorded so as to reflect the votes of each individual Member thereon. If both Houses approve by majority vote the recommendations pertaining to the office and positions described in any such subparagraph, the recommendations shall become effective for the offices and positions covered by such subparagraph at the beginning of the first pay period which begins after the thirtieth day following the ap-

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[7] This amendment originated as a rider to the bill extending the Emergency Unemployment Compensation Act of 1974. The amendment was approved by a 82-13 vote of the Senate on March 30, 1977, and was accepted by the House conferees in the ensuing conference. See 123 Cong. Rec. S5174-77 (daily ed., March 30, 1977). On April 4, 1977, the Senate approved the conference report by voice vote shortly after the House passed it 406 to 2.

proval of the recommendation by the second House to approve the recommendation."[8]

This revision moots that portion of appellant's complaint (Count I) that challenged the constitutionality of the provisions of the original § 225(i) under which, in the words of ¶ 9 of the complaint, "The President's recommendations become effective 30 days following transmittal of the budget, unless in the meantime other rates have been enacted by law or at least one House of Congress has enacted legislation which specifically disapproves of all or part of the recommendations." The new procedure whereby the votes of each individual Member must be recorded on the Presidential recommendations also moots ¶ 16 of the complaint, which alleged that appellant had been deprived by the original § 225(i) "of his constitutional right to vote on each adjustment proposed in congressional salaries." And that portion of the prayer for relief that seeks a declaration that the original §225(i) procedures for adjusting congressional rates of pay and salaries are "void and unconstitutional," a declaration upon which the injunctive request rests, must also be considered moot.

It appears, however, that this amendment of § 225(i) of the Salary Act does not affect the automatic cost-of-living salary increases authorized by the Adjustment Act. To the extent that appellant complains about the procedures under the Adjustment Act, the amendment may not moot his complaint.

But the new amendment does undermine most of the public policy arguments advanced by the appellant—

[8] This revised version of 2 U.S.C. § 359(1) is to be contrasted with the original version set forth in J.S.App. 15a.

and the *amici curiae*—as to the need for full briefing and oral argument of this appeal. Particularly affected is appellant's argument (J.S. 22) as to "a popular belief that Congress is not sufficiently accountable to the public . . . with respect to Congressional salaries." The new requirement of recording the votes of all individual Members on Salary Act increases drains all substance from that argument.

CONCLUSION

Because of appellant's lack of standing and the inescapable presence of a political question, this appeal should be dismissed for lack of justiciability. That lack of justiciability, moreover, has been compounded by the mootness of appellant's Salary Act challenges. And since mootness is an element of justiciability, the Court may deem it appropriate to dismiss the appeal without specifying which particular element of justiciability predominates.

Alternatively, of course, the appeal can be affirmed for the reasons expressed in Part II of the opinion below (J.S.App. 6a-8a).

Respectfully submitted,

EUGENE GRESSMAN
1828 L Street, N.W.
Washington, D.C. 20036
Counsel for Appellee
Kenneth R. Harding

April 6, 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1005

LARRY PRESSLER,

Appellant,

v.

W. MICHAEL BLUMENTHAL,
Secretary of the Treasury;

J. S. KIMMITT,
Secretary of the United States Senate;

KENNETH R. HARDING,
Sergeant-at-Arms of the United
States House of Representatives,

Appellees.

On Appeal from the United States District Court for the District of Columbia

MOTION OF APPELLEE J. S. KIMMITT, SECRETARY OF THE UNITED STATES SENATE, TO DISMISS, OR IN THE ALTERNATIVE, TO AFFIRM

CORNELIUS B. KENNEDY
R. KENLY WEBSTER
888 – 17th Street, N.W.
Washington, D.C. 20006
(202) 298-8208

Counsel for J. S. Kimmitt, Secretary of the United States Senate

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MOTION OF APPELLEE J. S. KIMMITT, SECRETARY OF THE UNITED STATES SENATE, TO DISMISS, OR IN THE ALTERNATIVE, TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellee J. S. Kimmitt, Secretary of the United States Senate, respectfully moves the Court to dismiss the appeal, or in the alternative, to affirm the decision of the three-judge district court on the merits.

OPINION BELOW

The opinion of the three-judge district court, Jurisdictional Statement Appendix (hereafter "J.S. App.") 1a-8a, is not yet reported.

JURISDICTION

The judgment of the district court was entered on October 12, 1976. A notice of appeal (J.S. App. 9a) was filed on October 22, 1976. On December 16, 1976, the Chief Justice extended the time for docketing the appeal to January 20, 1977. The jurisdictional statement was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

QUESTIONS PRESENTED

1. Whether appellant, as a sitting Member of Congress, has standing to challenge the statutory scheme adopted by Congress for ascertaining Congressional pay.

2. Whether appellant's challenge to the statutory procedures selected by Congress for determining Congressional compensation raises a nonjusticiable political question.

3. Whether the procedures for setting new rates of compensation for Members of Congress established by Congress in Section 225 of the Postal Revenue and Salary Act of 1967, 2 U.S.C. §§ 351-361, and Section 204(a) of the Executive Salary Cost-of-Living Adjustment Act of 1975, 2 U.S.C. § 31, as an exercise of its powers under the necessary and proper clause (Article I, Section 8), violate Article I, Section 6 (the Ascertainment Clause) or Article I, Section 1 of the Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 1 of the Constitution provides:

> "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Article I, Section 6 of the Constitution provides, in part:

> "The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States."

Article I, Section 8 of the Constitution provides, in pertinent part, that:

> "The Congress shall have Power . . .
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Section 225 of the Postal Revenue and Salary Act of 1967, 2 U.S.C. §§ 351-361, is set forth at Jurisdictional Statement (hereafter "J.S.") 11a-16a. Section 204(a) of the Executive Salary Cost-of-Living Adjustment Act of 1975, 2 U.S.C. § 31 is set forth in pertinent part at J.S. 3-4.

STATEMENT

The Statutes Involved

The statutes involved in this appeal are Section 225 of the Postal Revenue and Salary Act of 1967[1] ("Salary Act"), and Sections 2 and 3 of the Executive Salary Cost-of-Living Adjustment Act of 1975[2] ("Adjustment Act"), which provide procedures to set new rates of compensation for Members of Congress, federal judges and certain higher officials in the legislative, judicial and executive branch of Government. The Salary Act established a Commission on Executive, Legislative and Judicial Salaries ("the Commission"). Members of the Commission are appointed every fourth fiscal year for a term of office comprising that fiscal year. The Commission is directed to conduct a review of the rates of pay of Members of Congress, federal judges and higher-level positions in the executive, legislative and judicial branches, and submit to the President a report of the results of such review, together with its recommendations as to salaries for such positions.

The President is required to include in the next budget transmitted by him to Congress after the report and recommendations of the Commission are submitted to him, his recommendations with respect to the exact rates of pay he deems advisable for those offices and positions. The statute provides that the recommendations of the President transmitted to Congress in the budget become the effective rates of pay for such offices and positions, effective with the first pay period beginning 30 days after the transmittal of the President's recommendations, to the

[1] 2 U.S.C. §§ 351-361. See also Argument IV.

[2] 2 U.S.C. § 31.

extent that (A) Congress has not enacted into law a statute which establishes different rates of pay, (B) neither House of Congress has enacted legislation which specifically disapproves all or part of such recommendations, or (C) both. The statute further provides that the rates of pay which take effect under this statutory procedure "shall be printed in the statutes at large in the same volume as public laws and shall be printed in the Federal Register and included in the Code of Federal Regulations." 2 U.S.C. § 361.

The Adjustment Act provides a procedure established by statute for an automatic annual cost-of-living adjustment in the salaries of Members of Congress, federal judges and higher-level executive, judicial and legislative officials equal to the average percentage increase in the rates of pay of federal employees covered by the General Schedule being made by the President, pursuant to the standards expressly set forth in Sections 2 and 3 of the Federal Pay Comparability Act of 1970.[3] If, because of national emergency or economic conditions, the President considers it inappropriate to make such pay adjustments, he is directed to prepare and transmit to Congress a plan of alternative recommendations, which may be rejected by either House of Congress.

The Nature of the Case

The appellant brought this action in the district court as a citizen, a taxpayer and a Member of Congress to enjoin the increased salary disbursements to Members of the Congress authorized by the Salary Act and the Adjustment Act. Appellant claimed that the procedure provided by

[3] 5 U.S.C. §§ 5301, 5305-08; See § 5305 (Title 5 U.S.C.).

statute in the Adjustment Act for annual cost-of-living salary adjustments and the procedure provided by statute in the Salary Act for salary adjustments based upon the recommendations of a Commission and the President which were not specifically disapproved by either House of Congress, do not constitute "compensation . . . ascertained by law," as required by Article I, Section 6 of the Constitution, and further that these statutes also violate Article I, Section 1 of the Constitution which provides that all legislative powers ". . . shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."

A three-judge district court was convened pursuant to 28 U.S.C. §§ 2282 and 2284. Appellant moved for summary judgment and appellees filed cross motions for summary judgment and a motion to dismiss appellant's complaint. The three-judge district court in a memorandum opinion and order (J.S. App. 1a-8a) sustained the constitutionality of the statutes in question, granted summary judgment to appellees and dismissed the complaint (J.S. 2).

With respect to appellant's standing as a citizen, taxpayer and Member of Congress, the district court concluded that appellant had no standing as a citizen or taxpayer to assert his claims, and that as a Member of Congress he suffered no injury under the statutory scheme of the Salary Act in 1974 when a proposed salary increase was vetoed by the Senate, because the status quo was unaltered. (J.S. App. 5a.) However, the district court concluded that the October 1975 salary increase under the Adjustment Act "impaired the efficacy of" appellant's vote because it was effected without action by the House and Senate, and that appellant, therefore, had standing to

challenge not only that Act but also the Salary Act which establishes the procedures for determining the compensation to which the Adjustment Act percentages apply. (J.S. App. 5a.)[4]

ARGUMENT

I. APPELLANT LACKS STANDING TO CHALLENGE THE LEGISLATIVE ENACTMENTS BY WHICH HIS OWN SALARY AND THAT OF HIS FELLOW LEGISLATORS HAVE BEEN INCREASED.

While appellant's jurisdictional statement is silent with respect to his standing to bring this appeal, his standing for that purpose is, nevertheless, a threshold question for consideration by this Court. *Buckley v. Valeo,* 424 U.S. 1, 11 (1976); *Roe v. Wade,* 410 U.S. 113, 125 (1973).

As the district court correctly concluded, appellant lacks standing in his capacity as a citizen and a taxpayer to challenge the legislative enactments by which his own Congressional salary and that of his fellow legislators has been ascertained. *Richardson v. Kennedy,* 401 U.S. 901 (1971), *aff'g,* 313 F. Supp. 1282 (W.D. Pa. 1970).

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[4] The district court opinion is silent on whether there was any injury to appellant under the Adjustment Act in September 1976 as a result of the refusal of the House to appropriate funds for the 1976 cost-of-living pay increase, 122 CONG. REC. H9370-75 (daily ed. Sept. 1, 1976), because the status quo of congressional compensation also was unaltered as a result of that action. If so, it is the use by Congress of its appropriations powers to which the district court referred (J.S. 7a) which is the critical legislative action in determining whether appellant has been injured, and it is to such action that appellant's complaint more properly should be directed.

Appellant also lacks standing to bring this appeal in his capacity as a Congressman. Appellant concedes that adjustments to Congressional salaries under the 1975 Adjustment Act depend entirely on the adjustments to the General Services salaries ordered under the Federal Pay Comparability Act (J.S. 8), and that the amount of each annual adjustment under that Act "is governed by standards expressly set forth in the Act." (J.S. 9.) *See generally, National Treasury Employees v. Nixon,* 492 F.2d 587 (D.C. Cir. 1974). Appellant was a Member of Congress at the time the Adjustment Act adopting such a statutory scheme for ascertaining Congressional pay was enacted. Appellant, therefore, had the opportunity to vote, and did vote (121 CONG. REC. H7858 (daily ed. Jul. 30, 1975)) with respect to the statute which ascertained adjustments to Congressional salaries pursuant to specific statutory standards.

Thus, appellant was not prevented from voting to perform his legislative duty to ascertain Congressional salaries, as he alleges. Nor was the "efficacy" of his vote impaired so as to injure him when Congressional salaries were adjusted thereafter in October 1975, pursuant to such statutory standards, as the district court incorrectly concluded. In focusing its attention on the fact that the Congressional salary adjustments previously authorized became effective without a further vote, the district court failed to recognize that appellant could not have suffered an actual injury by this event. The salaries were adjusted at that time pursuant to express statutory standards. These standards had already been determined to be adequate in a case in which the court noted that by adopting them, Congress had "departed from the previously established Congressional pattern of dealing ad hoc with federal pay adjustments from time to time and provided a mechanism

pursuant to which pay rates for federal employees are adjusted by the President based upon a survey conducted by the Bureau of Labor Statistics in October of each year." *National Treasury Employees v. Nixon, supra,* 492 F.2d at 592. Furthermore, appellant voted on the statute which adopted such standards as the statutory scheme for ascertaining Congressional salaries. Thus, appellant could not have been injured and the efficacy of his vote could not have been impaired merely by the adjustment of the salaries. Furthermore, the statutory scheme for determining Congressional salaries upon which appellant voted was found to be constitutionally permissible by the district court. The district court erred, therefore, in concluding that appellant acquired standing by reason of the October 1975 adjustment in Congressional salaries.

Finally, appellant's disagreement with a statutory scheme adopted by Congress does not provide him with the requisite standing to challenge the statute in his capacity as a Congressman. *Holtzman v. Schlesinger,* 484 F.2d 1307 (2d Cir. 1973), *cert. denied,* 416 U.S. 936 (1974); *Korioth v. Briscoe,* 523 F.2d 1271 (5th Cir. 1975); *Harrington v. Bush,* ___ F.2d ___, No. 75-1862 (D.C. Cir. Feb. 18, 1977); *Harrington v. Schlesinger,* 528 F.2d 455 (4th Cir. 1975). *Compare, Coleman v. Miller,* 307 U.S. 433 (1939); *Kennedy v. Sampson,* 511 F.2d 430 (D.C. Cir. 1974). Furthermore, the statutes attacked by appellant specifically provide that Congress may establish other rates of compensation by statute or that the President's recommendations can be disapproved in whole or in part by the action of "at least one House of Congress," and they also provide that the role of the President is limited to making recommendations in the budget submitted by him to the Congress.

Since appellant is a Member of the House of Representatives, he was not, and is not, denied the right to introduce legislation which would specifically disapprove of all or part of the President's recommendations. Appellant admits that he never has introduced a bill or resolution to establish rates of compensation different from those recommended by the President or to disapprove all or any part of such recommendations. See Plaintiff's Answers to Defendant's First Interrogatories (hereafter "Answers"), No. 7. His constitutional right as a Member of Congress is, therefore, preserved to him even if not exercised by him. His success in exercising his right, should he introduce such a bill or resolution, is dependent upon his ability to attract the support of other Members of Congress for his position.

Appellant also admits that he has had the opportunity to vote as a Member of the House of Representatives on legislation proposed pursuant to 2 U.S.C. § 359(1)(A) or (B) (the Salary Act) and has co-sponsored a bill to repeal the statutes he attacks (Answers 4, 5, 6, 9 and 10). Thus, appellant also concedes that he has not been deprived of his right to introduce legislation to repeal the statutes about which he complains.

Under these circumstances, appellant does not have the "personal stake in the outcome of the controversy" and requisite injury necessary to meet the requirements of Article III in order to bring this appeal. *See Baker v. Carr*, 369 U.S. 186, 204 (1962).

II. THE ISSUE PRESENTED BY APPELLANT IS A NONJUSTICIABLE POLITICAL QUESTION.

The standing and political question doctrines are both facets of the broader concept of justiciability. Either the absence of standing or the presence of a political question suffices to prevent the power of the federal judiciary from being invoked by the complaining party. *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 215 (1974). One of the tests for determining the presence of a political question is whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker v. Carr, supra*, 369 U.S. at 217. Article I, Section 6 of the Constitution demonstrates that the issue of Congressional compensation is committed by the Constitution to the Congress itself. The constitutional debates cited by appellant (J.S. 14-15) clearly confirm the textual commitment of this issue to the legislative branch.

That appellant presents a political question is also apparent from his argument that "[t]he process of raising Congressional salaries was frequently politically embarrassing to the members involved, but that embarrassment was merely a manifestation of the public accountability that Article I, Section 6, intended," and his argument that Congressional salaries should not be "intertwined" with executive and judicial salaries. (J.S. 20.) It is apparent, as well, from appellant's entire argument that his claim raises important questions of public policy from an "economic standpoint," a "government planning standpoint," and a "social policy standpoint." (J.S. 21-22.) By their very description, such matters are political questions within the province of the

Congress. The inclusion among them by appellant of the "legislative veto" procedure is clearly correct.[5]

Finally, appellant argues that his claim, if sustained, would restore public accountability with respect to Congressional salaries that Article I, Section 6 of the Constitution intended. (J.S. 22.) Again, this is a matter for Congress to resolve because it is textually committed by the Constitution to the Congress. Therefore, even appellant's arguments clearly suggest that this Court should dismiss this appeal on the ground that it raises a nonjusticiable political question.

III. THE DISTRICT COURT CORRECTLY DETERMINED THAT CONGRESS VALIDLY EXERCISED ITS BROAD DISCRETION IN THE SELECTION OF THE SCHEME FOR ASCERTAINING CONGRESSIONAL COMPENSATION AND NO SUBSTANTIAL QUESTION IS PRESENTED BY THIS APPEAL.

A. Appellant's Interpretation of Article I, Section 6, Is Incorrect and Is Not Supported by Prior Decisions, the Constitutional Debates or Previous Congressional Conduct.

The three-judge district court correctly rejected appellant's narrow interpretation of the phrase "ascertained by

[5] The doctrines of justiciability, especially those of standing, ripeness and political question, may well preclude any federal court from resolving the political as well as legal problems raised by the constitutional challenges that have been made to the "legislative veto" procedure. *See, e.g.*, Clark v. Valeo, D.C. Cir. No. 76-1825, now pending before this Court as No. 76-1105, in which the Court of Appeals for the District of Columbia Circuit instructed the district court to dismiss the case on grounds of unripeness and judicial prudence, without deciding such other justiciability issues as the standing and political question doctrines or reaching the constitutional challenge. In two other actions in which such challenges have been made in the context of the Salary Act, the courts are confronted with serious issues of justiciability that have yet to be resolved. Atkins v. United States, Nos. 41-76, 132-76, 357-76 (Ct. Cl.); McCorkle v. United States, E.D. Va., *appeal docketed*, No. 76-1479 (4th Cir.).

Law" in Article I, Section 6 of the Constitution. The Constitution expressly vests in Congress the power to ascertain its compensation, Article I, Section 6. The Constitution also provides that Congress shall have power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." Article I, Section 8.

Even the constitutional debates quoted by appellant (J.S. 14-15) reveal that various proposals for the ascertainment of Congressional compensation were considered and rejected and the issue ultimately resolved by placing the decision as to its pay in the discretion of Congress with public accountability as the check upon Congress' exercise of its broad discretion. And since *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) it has been established that the necessary and proper clause allows Congress such discretion with respect to the means by which the powers the Constitution confers on Congress are to be carried into execution, that all means which are appropriate and plainly adapted to that end, and are not prohibited, are constitutional, if the end is legitimate and within the scope of the Constitution. *Id.* at 421. Further, Congress is not confined to those single means without which the end would be entirely unattainable, *Id.* at 414, but may use its best judgment in the selection of measures, *Id.* at 420.

The only two cases cited by appellant for this point do not even suggest that the provisions involved in the statutes in question are not valid. Indeed, as this Court held in *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937), cited by appellant, the constitutional requirement that no money can be paid out of the Treasury unless it has been appropriated by an Act of Congress does not require that the Act of Congress specify the precise uses to which the appropriated money is to be put. And, it was the *absence*

of a statute vesting the appointment of inferior officers in the courts of law which concerned the district court in *Cain v. United States,* 73 F. Supp. 1019, 1021 (N.D. Ill. 1947), rather than the power of Congress to adopt such a statute. Thus, *Cain* does not support appellant where Congress *has enacted* a statute, as in this case. *See Surowitz v. United States,* 80 F. Supp. 716 (S.D.N.Y. 1948), in which the statute authorized heads of departments to appoint such numbers of employees of the various classes recognized by statute as may be appropriated for by Congress.

Furthermore, if appellant's interpretation were to be adopted, the Congress could no longer appropriate such amounts of money from the Treasury "as may be necessary" to pay claims against the Federal Government ascertained by the courts and certified by the Comptroller General,[6] nor could Congress continue to authorize by law the President and the heads of departments and agencies to appoint or shift in salary levels such inferior officers as they think proper when they consider such action necessary, subject to such restrictions as Congress may impose. *See, e.g.,* 5 U.S.C. § 5317, which authorizes the President to place up to 34 individuals in levels IV and V of the Executive Schedule.

Thus, at best, the fact that early Congresses established rates of Congressional pay in terms of precise dollar amounts represents only one means of implementing Congress'

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6 "There are appropriated, out of any money in the Treasury not otherwise appropriated, and out of the postal revenues, respectively, *such sums as may* on and after July 27, 1956, *be necessary* for the payment, not otherwise provide [sic] for, as certified by the Comptroller General, of final judgments, awards, and compromise settlements . . . ." 31 U.S.C. § 724a (emphasis supplied).

power to make laws necessary and proper for carrying into execution its power to ascertain its compensation. The discretion to select other statutory schemes to carry into execution that power clearly rests with the Congress under the necessary and proper clause, Article I, Section 6. *McCulloch v. Maryland, supra,* 17 U.S. at 421; *United States v. Fisher,* 6 U.S. (2 Cranch) 358, 396 (1805) ("Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution").

B. The Reasoning of the District Court On the Merits Is Correct.

None of the five objections appellant makes to the reasoning of the district court go to appellant's argument that Article I, Section 6, requires that Congress determine the precise dollar amount of its compensation. Instead, appellant objects to the conclusions of the district court that (1) when Congress adopted the 1967 Salary Act and the 1975 Adjustment Act, it acted "by law"; (2) that the statutory procedures in question resulted in an ascertainment "by law"; (3) that Congress, under Article I, Section 9, can limit the uses which may be made of appropriated monies; (4) that the interests of the Congress were represented on the Commission because the Speaker of the House and the President of the Senate each appoint two members to the Commission established by the Salary Act; and (5) that the Constitution is not to be parsed in the narrow, rigid manner of a statute, but must remain flexible and adaptable, placing reliance upon checks and balances built into our tripartite format and the sound attitude of voters expressed at the polls.

Of these five objections raised by appellant, three – the fact that Congress acted by law when it adopted the Salary Act and the Adjustment Act, the composition of the Commission established to make recommendations with respect to congressional, judicial and executive pay, and the need that the Constitution not be parsed in the narrow, rigid manner of a statute – on their face do not present substantial questions for review at this time.

In attacking the district court's suggestion that Congress has broad powers over the use of public monies under the appropriations clause, Article I, Section 9, which may be used to achieve substantive results, appellant overlooks the fact that Congress exercised its power under that clause to end the war in Viet Nam,[7] to prohibit the Civil Service Commission from determining the regulations and procedures governing the recruitment and examination of applicants for attorney positions under the Civil Service classifications,[8] and even to deny Members of Congress and the others covered by the 1975 Adjustment Act the pay increase they would otherwise have been entitled to under that Act in 1976. 122 CONG. REC. H9370-75 (daily ed. Sept. 1, 1976) (J.S. 7a).

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7 "None of the funds herein appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Viet Nam, South Viet Nam, Laos or Cambodia." Act of Feb. 9, 1976, Pub. L. No. 94-212, § 738, 90 Stat. 175.

8 "No part of the appropriation herein made to the Civil Service Commission shall be available for the salaries and expenses of the Legal Examining Unit of the Commission, established pursuant to Executive Order 9358 of July 1, 1943, or any successor unit of like purpose." Independent Agencies Appropriations Act, 1977, Pub. L. No. 94-363, Title IV, 90 Stat. 969.

Appellant's remaining objection is his dispute with the statutory schemes selected by Congress for the Salary Act and the Adjustment Act pursuant to its broad discretion under the necessary and proper clause, Article I, Section 8. Appellant appears to complain that Congress retained no power under the Adjustment Act to veto or approve salary increases. (J.S. 17.) With respect to the Salary Act, appellant complains that the Congress retained only a veto power over pay recommendations by the President. (J.S. 16.) Appellant overlooks the fact that such salary adjustments were under statutory schemes approved by affirmative acts of Congress, and that one type of adjustment was governed by express statutory standards and the other by a provision that when the President submits recommendations to Congress, either House of Congress, acting alone, can by negative vote prevent the recommendations from taking effect. The district court correctly concluded that neither of these statutory schemes "insofar as they govern the ascertainment of congressional compensation contravene the Constitution" (J.S. App. 8a).

Given the discretion reposed in Congress by the necessary and proper clause, Article I, Section 8, neither such contentions of appellant, nor his contentions that such a statutory scheme in the Salary Act "gives the American voters no record of where their Senators and Representatives stood" (J.S. 17), that normal parliamentary process cannot take place in a 30-day period (J.S. 17), and that consideration of Congressional salaries becomes confused with conflicting considerations regarding salaries for other officials (J.S. 17), warrant plenary consideration by this Court. It is a matter of public record that Senators and Representatives took particular care to make known to the American voters where they stood on pay increases

under both the Salary Act and the Adjustment Act,[9] that an amendment to the Adjustment Act rejecting a pay increase in 1977 was introduced, debated and passed in one day by the Senate,[10] and that the relationship between Congressional salaries, judicial salaries and higher-level executive salaries is expressly determined by Congress.

The arguments of appellant that from an economic standpoint a substantial expenditure is involved in the Congressional pay increases authorized by the challenged statutes, that from a governmental standpoint this Court should take this occasion to resolve doubts about the validity of proposed statutory provisions before they are adopted, that from a social policy standpoint Congressional, judicial and high-ranking executive pay should not be considered together, and that it is clear there is a popular belief that Congress is not sufficiently accountable to the public (J.S. 21-22), clearly deal with matters textually committed by the Constitution to Congressional decision. In any event, these arguments in the circumstances of this case do not present substantial questions for review at this time.

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9 *See, e.g.*, 122 CONG. REC. H9365-75 (daily ed. Sept. 1, 1976); 123 CONG. REC. H637 (daily ed., Jan. 31, 1977); 123 CONG. REC. H959 (daily ed. Feb. 8, 1977); 123 CONG. REC. H1021 (daily ed. Feb. 9, 1977); 123 CONG. REC. H1096 (daily ed. Feb. 16, 1977).

10 123 CONG. REC. S3848-51, 3879-80 (daily ed. Mar. 10, 1977).

C. Appellant's Objection to the Statutory Procedures in the Challenged Statutes Could Subvert the Methods of Ascertaining Non-Congressional Salaries Even if He Seeks Only Prospective Relief as to Members of Congress.

The statutory procedures of the statutes challenged by appellant apply to the determination of judicial and higher-level executive compensation as well as to Congressional compensation. The legislative history of both statutes makes it abundantly clear Congress intended to retain full control over such matters and to provide how executive salaries, judicial salaries and legislative salaries should relate to each other. *See* 113 CONG. REC. 36102, 36107-08 (1967); Conf. Rep. No. 1013, 90th Cong., 1st Sess., *reprinted in* [1967] U.S. Code Cong. & Ad. News, 2301, 2304; S. Rep. No. 94-333, 94th Cong., 1st Sess., *reprinted in* [1975] U.S. Code Cong. & Ad. News 845, 853.

Thus, appellant is in error in his assertion that his challenge to the procedure for ascertaining Congressional salaries will "not affect the operation of the statutes insofar as non-Congressional salaries are involved." (J.S. 22.) If the statutory procedures challenged by appellant in this case are constitutionally impermissible, they are also invalid for determining higher-level executive and judicial compensation.

IV. THE ISSUE AS TO THE ONE-HOUSE VETO MAY BE MOOT AS TO THE SALARY ACT.

Both appellant and the Members of the United States House of Representatives who have moved for leave to file a joint amici brief in support of appellant[11] complain that the challenged statutory procedure is limited to a power of disapproval which, under the rules of the House and Senate, is difficult to exercise, rather than requiring an affirmative act of approval. (J.S. 16-17) (Amici Brief, 1).

This issue may be moot as to the Salary Act. On April 4, 1977 both the House and Senate adopted a conference report on a bill to extend the Emergency Unemployment Compensation Act of 1974 for an additional year "and for other purposes," and sent the bill to the President. The bill includes an amendment to the Salary Act[12] previously

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[11] We The People, a public interest group, has also moved for leave to file an amicus brief. The arguments in that brief are not specifically addressed herein because We The People limits its presentation "to the public policy, not legal questions involved in this appeal." (We The People Amicus Brief, p. 2.)

[12] The text of the amendment to the Salary Act is as follows:

> "(a) Section 225(i) of Public Law 90-206 is amended to read as follows:
>
> '(i) EFFECTIVE DATE OF AND CONGRESSIONAL APPROVAL OF RECOMMENDATIONS OF THE PRESIDENT.–
>
> '(1) Within sixty calendar days of the submission of the President's recommendations to the Congress, each House shall conduct a separate vote on each of the recommendations of the President with respect to the offices and positions described in subparagraphs (A), (B), (C), and (D) of subsection (f) of this section, and shall

(Continued)

adopted by the Senate by a vote of 82 to 13.[13] The conference report was approved by the House by a vote of 406 to 2, and approved by the Senate by a voice vote.[14]

The amendment specifically requires each House to conduct a separate vote on each of the recommendations of the President with respect to Congressional, judicial and executive salaries within 60 calendar days after they are received and thereby approve or disapprove each of the salary recommendations of the President. The amendment further requires that such votes shall be reported, so as to reflect the

---

[12] (Continued)

> thereby approve or disapprove the recommendations of the President regarding each such subparagraph. Such votes shall be recorded so as to reflect the votes of each individual Member thereon. If both Houses approve by majority vote the recommendations pertaining to the offices and positions described in any such subparagraph, the recommendations shall become effective for the offices and positions covered by such subparagraph at the beginning of the first pay period which begins after the thirtieth day following the approval of the recommendation by the second House to approve the recommendation.
>
> '(2) Any part of the recommendations of the President may, in accordance with express provisions of such recommendations, be made operative on a later date than the date on which such recommendations otherwise are to take effect.'.
>
> (b) Section 225(j) of Public Law 90-206 is amended by inserting immediately after 'subsection (b)(2) and (3) of this section shall' the language ', if approved by the Congress as provided in subsection (i),'."

[13] 123 CONG. REC. S5174-77 (daily ed. Mar. 30, 1977).

[14] 123 CONG. REC. H2919, S5515 (daily ed. Apr. 4, 1977).

votes of each individual Member thereon, and that only if both Houses approve by majority vote the recommendations pertaining to such salaries, shall such recommendations become effective.

This action confirms the responsiveness of Congress not only to those proposals of its members which have acquired sufficient support, but also to the views of their constituents to whom Members of Congress must be responsive under our system of government. It also lends force to the argument that this appeal presents what is inherently a political question. See Argument II, pp. 11-12.

CONCLUSION

For the reasons stated above, appellee J. S. Kimmitt, Secretary of the United States Senate, respectfully requests that this Court either dismiss the appeal or, alternatively, affirm the decision of the district court on the merits.

Respectfully submitted,

CORNELIUS B. KENNEDY
R. KENLY WEBSTER
888 – 17th Street, N.W.
Washington, D.C. 20006
(202) 298-8208

Counsel for J. S. Kimmitt, Secretary of the United States Senate

Dated: April 6, 1977

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1005

LARRY PRESSLER
Member, United States House
of Representatives,
Appellant,

v.

W. MICHAEL BLUMENTHAL,
Secretary of the Treasury;
J. S. KIMMITT,
Secretary of the United States Senate;
KENNETH R. HARDING,
Sergeant-at-Arms of the United States
House of Representatives,
Appellees.

On Appeal From the United States
District Court
For the District of Columbia

APPELLANT'S REPLY TO APPELLEES' MOTIONS TO AFFIRM OR DISMISS

LARRY PRESSLER
1132 Longworth House Building
Washington, D.C. 20505
(202) 225-2801

Appellant, Pro Se

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1005

LARRY PRESSLER
Member, United States House
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v.

W. MICHAEL BLUMENTHAL,
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APPELLANT'S REPLY TO APPELLEES'
MOTIONS TO AFFIRM OR DISMISS

ARGUMENT

Appellees Blumenthal, Kimmitt, and Harding have filed motions for summary affirmance or, in the alternative, for dismissal

of this appeal on grounds of standing, justiciability, and mootness.

1. Appellees' arguments on the merits of appellant's claim under Article I, Section 1, and the ascertainment clause of Article I, Section 6, add nothing to the district court's opinion except bare allegations that the result was clearly correct and that the issue is an unimportant one. However, as the district court itself stated, the issue raised by appellant is unprecedented; and the public events that have transpired since the docketing of appellant's appeal and the amici briefs that have been filed in support of appellant's claim clearly reflect the public importance of the question raised.

2. Appellees' discussions of standing and justiciability are merely recapitulations of the arguments they presented unsuccessfully in district court. Although appellant still claims standing as a citizen and a taxpayer, the district court's conclusion that appellant has standing as a Congressman was clearly correct.

3. The district court was also clearly correct in rejecting appellees' efforts to avoid the merits on justiciability grounds. Appellees' justiciability arguments misconstrue the basic issue involved. Under Article I, Section 1, and the ascertainment clause of Article I, Section 6, the rates

of Congressional pay clearly should be a political question. The ratification debates demonstrate the Framers' intent to make Congress the sole judge of its own salary rates -- subject, however, to the proviso that Congress must affirmatively enact the salary rates "by law" and thereby subject itself to the political restraint of answering to the voters for its salary adjustments. It is Congress' effort to avoid the political question of ascertaining its own salaries that gives rise to appellant's claim. And that claim -- namely, whether the Constitution requires Congress to ascertain its salary rates by affirmative legislative action -- is plainly justiciable.

4. Appellees Kimmitt and Harding have suggested that passage of the so-called Bartlett amendment moots appellant's claim with respect to the Salary Act. Kimmitt Motion at 20-22; Harding Motion at 15-17. Although appellant applauds the passage of the Bartlett amendment, the enactment of that provision in no way moots his claims.

First, appellant seeks to enjoin those portions of all future Congressional salary disbursements that have been "ascertained" under the 1967 Salary Act. The Bartlett amendment is prospective only and does not cure the Constitutional defects in the 1969 and 1977 Salary Act

adjustments which raised Congressional salaries by some $23,200 per annum. The fact that Congress may hereafter vote on future Salary Act adjustments does not moot appellant's claim because appellees continue to make Congressional salary disbursements which include amounts that were not ascertained "by law."

Second, the Bartlett amendment does not affect in any way the automatic cost-of-living adjustments made annually to Congressional salaries under the 1975 Adjustment Act. Although appellees suggest that the statutory standards for determining increases under the Adjustment Act somehow enhance the statute's validity, precisely the reverse is true. The Adjustment Act itself contains no standards whatsoever. Instead, the Adjustment Act simply grants to Congress an automatic increase equal to the overall average of the adjustments made to GS and other statutory salary schedules under the Federal Pay Comparability Act. 2 U.S.C. § 31(2). The standards to which appellees refer are concerned solely with the appropriateness of the levels of the GS and other statutory salary schedules. The adjustments the President orders under the Federal Pay Comparability Act automatically increase Congressional salaries by the same average amount without regard to the propriety of such increases for Congress. Indeed, under the Adjustment

Act, Congress does not normally have the opportunity of disapproval. The adjustments normally take effect automatically without even the opportunity of a legislative veto. Only when the President submits an alternative plan -- i.e., a smaller adjustment than would be required under the Federal Pay Comparability Act standards -- does Congress have a legislative veto. See 5 U.S.C. § 5305(c)(2). And that veto, if exercised, compels the President to make the adjustments in the full amount required by the Federal Pay Comparability Act standards. 5 U.S.C. § 5305(m).

CONCLUSION

For all of the reasons stated above, appellant submits that the question presented in this appeal is substantial and that the Court should note probable jurisdiction and decide the case only upon full briefing and oral argument.

Respectfully submitted,

LARRY PRESSLER
1132 Longworth House Building
Washington, D.C. 20505
(202) 225-2801

Appellant, Pro Se

Dated: April 15, 1977

CERTIFICATE OF SERVICE

I, Larry Pressler, hereby certify that pursuant to Rule 33, paragraphs 1 and 2(a), I have served upon counsel for each appellee and the Solicitor General a copy of Appellant's Reply to Appellees' Motions to Affirm or Dismiss filed this date by depositing three copies in the United States mail, first class postage prepaid, to each of the following on this 15th day of April 1977:

The Solicitor General
United States Department
of Justice
Washington, D.C. 20503
Counsel for W. Michael Blumenthal

Cornelius B. Kennedy, Esquire
Kennedy & Webster
888 Seventeenth Street, N.W.
Washington, D.C. 20006
Counsel for J. S. Kimmitt

Eugene Gressman, Esquire
1828 L Street, N.W.
Washington, D.C. 20036
Counsel for Kenneth R. Harding

Larry Pressler
Larry Pressler

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1005

LARRY PRESSLER
Member, United States House
of Representatives,
Appellant,

v.

MICHAEL BLUMENTHAL,
Secretary of the Treasury;
FRANCIS R. VALEO,
Secretary of the United States Senate;
KENNETH R. HARDING,
Sergeant-at-Arms of the United States
House of Representatives,
Appellees.

On Appeal From the United States
District Court
For the District of Columbia

Motion to File
Amicus Curiae Brief of

WE THE PEOPLE

RANDALL L. STAMPER
222 Pacific National Bank of
Washington Building
Spokane, Washington 99201
(509) 838-8601

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1005

LARRY PRESSLER
Member, United States House
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v.

MICHAEL BLUMENTHAL,
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Sergeant-at-Arms of the United States
House of Representatives,
Appellees.

On Appeal From the United States
District Court
For the District of Columbia

Motion to File Amicus Curiae Brief of WE THE PEOPLE

WE THE PEOPLE hereby respectfully moves for leave to file the attached brief amicus curiae in this case. The consent of the appellant, pro se, has been obtained. The consent of the attorney for appellee Harding has been refused. WE THE PEOPLE has not received consent nor refusal from appellees Blumenthal or Valeo.

The interest of WE THE PEOPLE in this case arises from the fact that WE THE PEOPLE is a Washington State, non-partisan, public interest group organized for the purpose of encouraging greater citizen participation in public policy questions such as arise squarely in this matter. This amicus brief is submitted because it presents a viewpoint directly related and relevant to the subject matter which otherwise might not be considered and which would affect the final judgment in the matter.

Appellant challenged the constitutionality of Section 225 of the Postal Revenue and Salary Act of 1967 and Section 204(a) of the Executive Salary Cost-of-Living Adjustment Act of 1975 as violative of Article I, Sections 1 and 6 of the Constitution. Appellant cited Prior Decisions, the Constitutional Debates, and the Contemporaneous Conduct of the Early Congresses, and barely mentioned the public policy issues involved. Since it is likely that appellant may pursue the

same course in this Court, it is believed the brief which amicus curiae is requesting permission to file will contain a more complete argument on the public policy questions involving Congressional accountability, code of ethics and historical incomes ratio between Congress and the people.

Respectfully submitted,

John Sonneland

John Sonneland
Chairman, on behalf of
WE THE PEOPLE

DATED this 29th day of March, 1977, in Spokane, Washington.

Randall L. Stamper

Randall L. Stamper
Attorney at Law

CERTIFICATE OF SERVICE

I, John Sonneland, hereby certify that I have served this motion of WE THE PEOPLE as amicus curiae on each of the parties by depositing three copies in the United States mail, air mail, postage prepaid, to each of the following:

Cornelius B. Kennedy, Esquire
Kennedy & Webster
888 Seventeenth Street, N.W.
Washington, D. C. 20006
Counsel for Francis R. Valeo

Eugene Gressman, Esquire
1828 L Street, N.W.
Washington, D. C. 20036
Counsel for Kenneth R. Harding

The Solicitor General
United States Department of Justice
Washington, D. C. 20503
Counsel for Richard Blumenthal

The Honorable Larry Pressler
1132 Longworth House Office Building
Washington, D. C. 20515
Pro Se

John Sonneland

No. 76-1005

IN THE

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Amici

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MOTION FOR LEAVE TO FILE AN AMICUS CURIAE
BRIEF IN SUPPORT OF APPELLANT

1. Congressman James Jeffords, on behalf of himself and on behalf of Congressmen James Abdnor (R-S. Dakota), Clarence Miller (R-Ohio), Charles Grassley (R-Iowa), Richard Gephardt (D-Missouri), Romano Mazzoli (D-Kentucky), John Duncan (R-Tennessee), James Collins (R-Texas), Berkley Bedell (D-Iowa), Millicent Fenwick (R-N.J.), Leon Panetta (D-Cal.), Margaret Heckler (R-Mass.), Nick Joe Rahall (D-W. Va.), Mickey Edwards (R-Okla.), Robert Walker (R-Penn.), James Cleveland (R-N.H.), Anthony Moffett (D-Conn.), Dan Glickman (D-Kansas), and William Cohen (R-Maine) requests leave of the Court to submit an *amicus curiae* brief in support of the appeal by Congressman Larry Pressler (No. 76-1005).

2. Congressman Jeffords submitted an *amicus* brief in the case below and has maintained an active interest in the case from its inception.

3. Congressman Pressler has consented to and expressed his interest in this *amicus,* but attorney for an Appellee has stated his objection to the submission of it.

4. While Congressman Pressler has expressed his views articulately on the merits of his case, we believe it is important to establish that his views are not isolated but represent a broad spectrum of the Congress, and that the bipartisan nature of the group of Congressman submitting this *amicus* is an important indication to the Court that Congressional procedures have been such as to frustrate the voice of a majority of the Congress on an issue of vital importance to the Congress and its national constituency.

5. The Congressmen here submitting this request to file such *amicus* believe the Court's decision in this appeal will have a direct impact on the actions of the *amici* in discharging their constitutional obligations under Article I, Sections 1 and 6. Second, the disposition of this appeal will substantially affect the ability of the voters represented by the *amici* to determine the position of their elected representatives with respect to the rates of Congressional pay. Third, the rates of compensation paid to each of the *amici* as members of Congress may be directly affected by the Court's decision in this appeal.

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ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF Congressmen James Jeffords, James Abdnor, Clarence Miller, Richard Gephardt, Romano Mazzoli, John Duncan, James Collins, Berkley Bedell, Millicent Fenwick, Leon Panetta, Margaret Heckler, Nick Joe Rahall, Mickey Edwards, Robert Walker, James Cleveland, Anthony Moffett, Dan Glickman and William Cohen, AS *AMICI CURIAE*

Interest of the Amici

The *amici curiae* submitting this brief are duly elected members of the Ninety-Fifth Congress of the United States. As members of Congress, the *amici* have a three fold interest in the outcome of this appeal. First, the Court's decision in this appeal will have a direct impact on the actions of the *amici* in discharging their constitutional obligations under Article I, Sections 1 and 6. Second, the disposition of this appeal will substantially affect the ability of the voters represented by the *amici* to determine the position of their elected representatives with respect to the rates of Congressional pay. Third, the rates of compensation paid to each of the *amici* as members of Congress may be directly affected by the Court's decision in this appeal.

ARGUMENT

I. THE STATUTORY PROVISIONS AT ISSUE SUBSTANTIALLY IMPAIR THE EFFICACY OF THE VOTE OF EACH MEMBER OF CONGRESS.

The rate of compensation for each Member of Congress is presently computed on the basis of two statutes: The Postal Revenue and Salary Act of 1967[1] and the Executive Salary Cost-of-Living Adjustment Act of 1975.[2] Under these statutes, Congressional salary rates are adjusted periodically in amounts determined by the

1. Pub. L. No. 90-206, 81 Stat. 642, *codified at* 2 U.S.C. §§ 351-361.

2. Pub. L. No. 94-82, 89 Stat. 421, *codified at* 2 U.S.C. § 31.

President.[3] Congressional involvement in the adjustment of its members' compensation is restricted under both statutes to a limited power of disapproval. To exercise this power of disapproval, one House of Congress must act affirmatively within thirty days to reject the salary adjustments recommended by the President. In the absence of an affirmative resolution of disapproval, the salary rates recommended by the President automatically go into effect.

Amici believe that the statutory procedures for Congressional disapproval of Presidential salary recommendations substantially impair the efficacy of their votes as Members of Congress in ascertaining the rates of Congressional compensation.

The power of Congressional disapproval under the statutes at issue in this appeal must be exercised, if at all, within thirty days of the relevant Presidential salary recommendation. In legislative terms, thirty days is an extremely brief period of time for securing any type of affirmative action. Although Congress has, on occasion, taken affirmative action on a matter in less than thirty days, such expeditious treatment normally is possible only when there is overwhelming support in favor of the measure and there is some extraordinary outside circumstance requiring extremely speedy action. As a consequence, even though a majority of one House of Congress may be opposed to a salary adjustment recommended by the President, the thirty day time limit on the power of disapproval may make it impossible for Members of Congress to have an opportunity to cast their votes.

3. Both the Salary Act, *supra*, note 1, and the Cost-of-Living Act, *supra*, note 2, provide for commissions to study and report on appropriate salary adjustments. These commissions report to the President, who, in turn, recommends to Congress the adjustments which go into effect unless the increases are rejected by a resolution of disapproval. 2 U.S.C. §§ 31 (2), 351-359, 5 U.S.C. § 5305.

The reverse nature of the disapproval power, which allows new governmental action to be initiated if no Congressional action is taken, also impairs the efficacy of each Member's vote. The parliamentary procedures used in the Senate and House of Representatives have been developed solely to regulate the process by which Congress enacts affirmative legislation. These parliamentary procedures include numerous methods by which a small minority can delay action that is desired by a substantial majority. So long as Congress is acting by affirmative legislation, all of the various procedural devices for delay tend to have the salutary effect of ensuring that Members of Congress will have ample time for deliberation and consultation before some new governmental action is taken. In the case of a thirty day disapproval power, however, all of the devices for delay operate to frustrate, rather than foster, the goal of deliberate Congressional action.

In the final analysis, the decision to bring a salary adjustment disapproval resolution up for floor action depends not upon the will of the majority in either House, instead it depends almost exclusively upon the discretion of the majority leadership and the committees to which the resolution has been referred.

Disapproval resolutions, like all other legislative proposals, are normally referred to committees after introduction. If the House and Senate committees fail to report a disapproval resolution in time for floor action within the statutory thirty day time limit, the pay raise recommendation in question will normally take effect without any opportunity for Members of Congress to vote on the question. This, in fact, has been the fate of virtually all of the salary adjustment disapproval resolutions introduced in the past.[4]

4. See notes 9-11, *infra*.

In the House of Representatives there are only two basic ways that a disapproval resolution not reported by committee can be brought to the floor for a vote: By motion to discharge the committee and by motion to suspend the rules. Neither of these devices is of any significant value in forcing a vote on a salary adjustment disapproval resolution.

Motions to discharge a committee cannot be introduced in the House until the measure that is the subject of the motion has been pending before the committee for more than thirty days.[5] Since Congressional power to disapprove a pay raise recommendation is limited to thirty days, the salary adjustment in question will always take effect before a motion to discharge can be introduced. Moreover, the motion to discharge a committee would probably be of little value even if the statutory period for disapproval was longer than thirty days. Motions to discharge are rarely introduced, largely because of traditional deference to the committee system. Furthermore, the relatively few motions to discharge that are introduced frequently fail because such a motion cannot be acted upon until a majority of the full House has formally joined in sponsorship of the motion.[6]

Motions to suspend the rules are of equally little value in forcing floor action in the House or a disapproval resolution stalled in committee. Motions to suspend the rules normally are in order in the House only on the first and third Mondays of each month. Motions to suspend the rules require a two-thirds majority for passage and must, upon demand by any Member, be seconded by a simple majority in a teller vote.[7] Finally, and most importantly,

5. House Rule XXVII. 4.

6. *Id.*

7. House Rule XXVII. 1, 2.

the Speaker of the House has absolute discretion in recognizing any Member who rises to move suspension of the rules.

In the Senate, the procedures for bringing a measure stalled in committee to the floor are somewhat more flexible than those in the House. Motions to discharge a committee may be introduced in the Senate without a waiting period and passage requires only a simple majority. Motions to suspend the rules in the Senate also may be introduced at any time. However, if any Senator objects to either type of motion, the motion must lay over one day, after which it is eligible for floor action in the order of its placement on the calendar. As a practical matter, the leadership of the Senate can avoid floor action on any such motion by recessing each legislative day before the measure comes up on the calendar. This was the fate of one of the Senate efforts to disapprove the most recent Congressional pay raise recommendation.[8]

One final method for forcing floor action is available in the Senate. That method is to offer the disapproval measure as an amendment to some other unrelated legislative business. This alternative is possible because the Senate does not normally require that amendments be germane to the subject matter of the proposal being amended. A disapproval resolution offered in the form of an amendment to some other legislative proposal, however, is still subject to the possibility of a filibuster as well as the possibility that the underlying proposal could be defeated.

In the face of all of these obstacles, the ability of individual Senators and Representatives to record their votes on the "enactment" of a salary adjustment is severely curtailed.

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8. See 123 Cong. Rec. S 2127, 2128 (Feb. 3, 1977).

II. THE STATUTORY PROCEDURES AT ISSUE IN THIS APPEAL SUBSTANTIALLY IMPAIR THE VOTERS' ABILITY TO ASCERTAIN THE POSITION TAKEN BY THEIR SENATORS AND REPRESENTATIVES.

One of the essential elements of any representative democracy is the ability of the voters to ascertain the position taken by their elected officials. To preserve the representative character of Congress, Article I, Section 5 of the Constitution requires that:

> Each House shall keep a Journal of its Proceedings, and from time to time publish the same. . .; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present be entered on the Journal.

Thus the constitution contemplates that no new governmental action can be authorized by Congress without: (1) a record being made of the action in the Journal of each House and (2) a record being made of each Member's vote if such a record is requested by one-fifth of the Members present.

The statutory procedures for adjusting Congressional pay at issue in this appeal effectively nullify all of the protections afforded to the public by Article I, Section 5. Under the statutes in question, there is no instance in which either House must vote to enact an increase in the salary rates for its members. Raises recommended by the President under the Salary Act can go into effect without any recorded action by either House, much less any recorded vote. Under the Cost-of-Living Adjustment Act, pay raises normally go into effect without even the possibility of Congressional disapproval.

Although either House of Congress can record its support in favor of a recommended pay raise if it wishes to do so, the actual experience under the statutes clearly shows that Congress is extremely reluctant to voluntarily record its views in support of a pay raise. To date, three Congressional pay raises have been recommended by the President under the Salary Act. Forty-seven Representatives introduced thirty-four resolutions of disapproval with respect to the first pay raise recommendation in 1969.[9] Ninety-five Representatives introduced sixty-three resolutions to disapprove the second pay raise recommendation in 1974.[10] Seventy-one Representatives introduced thirty-three resolutions to disapprove the third pay

9. H. Res. Nos. 128, 133, 136, 138, 139, 144, 145, 147, 149, 153, 155, 158, 162, 164, 165, 166, 170, 171, 173, 178, 181, 183, 186, 187, 190, 195, 196, 205, 208, 209, 210, 215, 221, 222, 91st Cong., 1st Sess. (1969). All of these disapproval resolutions were referred to the House Post Office and Civil Service Committee. That Committee did not organize itself in time to take action on any of the resolutions before the effective date of the recommended pay raise. In an effort to force floor action, fifteen Representatives introduced fourteen resolutions requiring consideration of the disapproval matter by the whole House. H.R. Res. Nos. 142, 146, 150, 159, 163, 172, 179, 188, 191, 193, 194, 203, 206, 207, 91st Cong., 1st Sess. (1969). These resolutions were referred to the House Rules Committee, which voted in executive session to table the measures.

10. H. R. Res. No.s 806, 807, 808, 811, 812, 813, 186, 817, 819, 820, 821, 826, 827, 828, 830, 831, 833, 834, 836, 837, 839, 841, 842, 844, 845, 849, 850, 851, 852, 853, 861, 866, 868, 869. 870, 875, 876, 879, 880, 882, 887, 888, 890, 891, 892, 893, 905, 908, 909, 910, 913, 914, 919, 922, 924, 925, 927, 936, 940, 941, 942, 946, 958, 93rd Cong., 2d Sess. (19740. These resolutions were referred to the House Post Office and Civil Service Committee. That Committee initially avoided the issue by failing to form a quorum, but four days after the Senate Post Office and Civil Service Committee reported a resolution that would have disapproved only the Congressional portion of the President's recommendations, the House committee reported a resolution (H. R. Res. 807) disapproving all of the pay raise recommendations, including the raises proposed for the Judicial and Executive branches. H. R. Rep. No. 870, 93rd Cong.,

raise recommendation in 1977.[11] Not a single one of these one hundred thirty disapproval resolutions ever reached the floor of the House or received a vote of any sort by the House membership.

The record in the Senate is only slightly better. A resolution to disapprove the first pay raise recommendation did reach a floor vote in the Senate in which disapproval was defeated by a narrow vote of 34-47.[12] The Senate passed by an overwhelming 71-26 majority a resolution disapproving the second pay raise recommendation.[13] A resolution to disapprove the third pay raise was defeated in the Senate by a vote of 42-56 on a motion to table.[14]

There is probably no coincidence in the fact that the House of Representatives (whose Members must stand for election every two years) has never voted on a Salary Act disapproval resolution while the Senate (whose members stand for election only every six years) has taken at least some form of recorded vote on each Salary Act

10. continued
2d Sess. (1974). The Senate resolution was amended on the floor to disapprove all of the pay raise recommendations and passed on March 6, 1974. Thereafter no action was taken by the House on the resolution reported by the House committee.

11. H. R. Res. Nos. 115, 126, 129, 135, 152, 191, 197, 201, 211, 225, 243, 244, 245, 247, 249, 250, 253, 254, 255, 258, 249, 260, 263, 264, 265, 272, 276, 277, 278, 281, 288, 290, 292, 95th Cong., 1st Sess. (1977). These resolutions were referred to the House Post Office and Civil Service Committee. That Committee held hearings on the disapproval issue but failed to report any of the resolutions out of committee.

12. *See* 115 Cong. Rec. 2716 (February 4, 1969).

13. *See* 120 Cong. Rec. S2878-2900 (March 6, 1974).

14. *See* 123 Cong. Rec. S2016 (February 2, 1977).

recommendation. It is also probably no coincidence that the one Salary Act recommendation actually disapproved was the only one which came before the Congress in a Congressional election year.

In addition to the Salary Act increase, there has been one Cost-of-Living Act adjustment. Under the terms of that act, the cost-of-living adjustment was not subject to Congressional disapproval. However, since the amount of the adjustment exceeded the amounts available under the Legislative Branch Appropriations Act, disbursements could not be increased to the rate ordered under the adjustment.[15]

In short, since 1967 two Congressional pay raises have gone into full effect, one has been defeated, and one has been nullified for lack of appropriations, but the voters have no recorded action by the House of Representatives on any of these pay raise measures and none of the votes recorded in the Senate were required by the statutes for the pay raises to go into effect. This performance falls far short of satisfying the voters' legitimate need to ascertain the position of their Senators and Representatives with respect to rates of Congressional pay.

III. THE ISSUE PRESENTED BY THIS APPEAL IS A TIMELY AND UNPRECEDENTED ONE WHICH DESERVES PLENARY CONSIDERATION IN THIS COURT.

As the District Court noted in its opinion, the issue presented by Congressman Pressler in this case is one of first impression. Memorandum Opinion at 5. No prior decision has ever considered the scope of Congress'

15. *See* Executive Order 11941 (October 1, 1976), 41 Fed. Reg. 43889, at 43894 (October 5, 1976).

obligations under Article I, Section 1 and the ascertainment clause of Article I, Section 6. The unprecedented nature of the question presented by Congressman Pressler, by itself, warrants plenary review of the appeal by this Court.

The issue presented is also one of timely and substantial public importance. In the past month, Members of Congress received a very sizeable pay raise under the Salary Act. Although the size of the pay raise was controversial, public concern focused primarily on the statutory procedures that allowed Congress to raise its own salary by doing nothing. Even those who defended the amount of the recent pay raise were almost unanimous in their condemnation of the statutory procedures at issue in this appeal.[16] The prospect of another automatic pay raise in October of this year has heightened public concern over the statutory procedures for adjusting Congressional pay.[17]

The issue presented in this appeal is also important because it is closely related to the broader controversy over the constitutionality of any form of Congressional veto. For years scholars have debated whether the Congressional veto device impermissibly impairs the veto power of the Executive branch.[18] At least four Presidents[19] and three

16. *See, e.g.*, Washington Post, Feb. 6, 1977, C-6, cols. 1 and 2.

17. *See, e.g.*, Washington Star, March 2, 1977, A-18, cols. 1 and 2.

18. *See, e.g.*, Boisvert, *A Legislative Tool for Supervision of the Administrative Agencies: The Laying System*, 25 Fordham L. Rev. 638 (1957); Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 Geo. Wash. L. Rev. 468 (1962); Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 Harv. L. Rev. 569 (19530; Stewart, *Constitutionality of the Legislative Veto*, 13 Harv. J. Legis. 593 (1976); Stone, *The Twentieth Century Administrative Explosion and After*, 52 Calif. L. Rev. 513 (1964); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Calif. Ll Rev. 983 (1975).

19. 59 Cong. Rec. 8609 (1920) (veto message of President Wilson); 76

Attorneys General[20] have argued that legislative vetoes of various form are unconstitutional. Congress itself has studied but never resolved the question.[21] The issue was raised but not decided in *Buckley* v. *Valeo*, 424 U.S. 1 (1976).[22] The issue is again before this Court in *Clark* v. *Valeo*, No. 76-1105 (docketed February 9, 1977). Although the *amici* express no opinion on the merits of the arguments in *Clark* v. *Valeo*, they believe that plenary review of that case together with the appeal herein would present the Court with a unique opportunity to examine the effects of the Congressional veto on both the Legislative and the Executive branches of government.

CONCLUSION

For the reasons stated above, the *amici* believe that probable jurisdiction should be noted in this appeal.

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19. continued

Cong. Rec. 2445 (1933) (veto message of President Hoover); Jackson, *A Presidential Legal Opinion*, 66 Harv. L. Rev. 1353, 1357-1358 (1953) (memorandum from President Roosevelt to then Attorney General Jackson); H. R. Doc. No. 520, 82d Cong., 2d Sess. 7 (1952) (veto message of President Truman).

20. 37 Ops. Atty. Gen. 56 (1953); Jackson, *A Presidential Legal Opinion*, 66 Harv. L. Rev. 1353, 1355-1357 (1953); Unpublished memorandum dated January 31, 1977 from Attorney General Griffin Bell to President Carter.

21. *See, e.g.*, Senate Committee on Government Operations, Vol. II, Congressional Oversight of Regulatory Agencies, at 116, 95th Cong., 1st Sess. (1977).

22. 424 U.S. at 140 n. 176, *but cf. id.* at 282-286 (White, J., concurring & dissenting). *See* Clagget & Bolton, *Buckley v. Valeo, Its Aftermath and Its Prospects: The Constitutionality of Government Restraints on Political Campaign Financing*, 29 Vand. L. Rev. 1327, 1344-1353 (1976).